IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-869

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

INDEX TO CITATIONS

Statutes:

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Petitioner[1] Brotherhood of Railway and Airline Clerks [hereinafter "BRAC"], an intervenor in the proceedings before the United States Court of Appeals for the Second Circuit urging reversal of a decision by the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"],

[1]Respondents to this instant petition are: The United States of America, and the Interstate Commerce Commission, respondents below; American Trucking Associations, Inc. and twenty-four motor carriers, intervenors in support of respondents below; REA Express, Inc., a bankrupt, and C. Orvis Sowerwine, Trustee, petitioners below; and Alltrans Express, U.S.A., Inc., an intervenor in support of petitioners below. Petitioner BRAC has been informed that REA Express, Inc., and its trustee, C. Orvis Sowerwine, will also be filing in this Court a petition for a writ of certiorari.

respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 16, 1977.

ORDERS AND OPINIONS BELOW

The judgment and opinion of the Court of Appeals for the Second Circuit was entered on September 16, 1977, and is not yet officially reported. It is reproduced as Appendix A to this petition. The initial Report and Order of the Interstate Commerce Commission which was the subject of this review proceeding was decided on November 17, 1976, and was served on November 19, 1976. It is reproduced as Appendix B to this petition. On January 27, 1977, the Commission decided various petitions to reconsider and to intervene, and on January 28, 1977, the Commission issued that decision. It is reproduced as Appendix C to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on September 16, 1977, and this petition for a writ of certiorari has been filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission's ostensible reliance on Rule 247(f) of its Rules of Practice to dismiss an application for permanent authority for the "hub system" and to thereafter mechanically rely on that dismissal as a basis for revoking a temporary authority was arbitrary, capricious and an abuse of discretion?

2. Did the Court of Appeals and the Commission err in not considering the drastic effect that the Commission's decision to effectively end REA would have upon the reemployment and monetary rights of REA's thousands of long and faithful employees?

STATUTES AND REGULATIONS INVOLVED

Sections 206(a)(1) and 210a(a) of the Interstate Commerce Act, 49 U.S.C. §§306(a)(1), and 310a(a), are involved in this case and are reproduced in Appendix D to the petition. Rule 247(f) of the Commission's Rules of Practice, 49 C.F.R. §1100.247(f) (1976) (now, Rule 247(g)), is also material to this petition and has been reproduced in Appendix D to this petition. The pertinent portion of Rule 247(f) reads as follows:

> An applicant who does not intend timely to prosecute its application, shall promptly request dismissal thereof. Failure to prosecute an application under procedures ordered by the Commission will result in dismissal thereof. . . .

STATEMENT OF THE CASE

Railroads had provided an express package service for many years by the early 1900's, and in 1929 the railroads created the Railway Express Agency, Inc., a non-profit agency, to perform that express service. *See, Securities and Acquisition of Control of Railway Ex. Agency,* 150 I.C.C. 423 (1929). REA, however, was not designed to be profitable, and by 1969 with the drastic decline in intercity rail passenger service, the railroads "extricated themselves from its ownership." App. A at 5a. REA Express, Inc. emerged as an independent company carrying on the business of Railway Express, and continued to employ

thousands of employees, most of whom were represented by petitioner BRAC under the Railway Labor Act, 45 U.S.C. §151, *et seq.*

Historically, REA was intertwined with the rail systems for its routes, and by 1968 found itself "with an uncoordinated and unmanageable system of interlocking rail and motor routes." App. A at 5a. In order to solve that problem, REA proposed in 1968 a fundamental restructuring of its routes and submitted an application to the ICC under Section 206 of the Interstate Commerce Act, 49 U.S.C. §306, for permanent operating authority under what has become known as the "Hub system" — *i.e.*, twenty-four central points for the receipt and dispatch of traffic. Upon application of REA, the Commission on June 3, 1968, granted REA temporary authority under Section 210a(a) of the Act, 49 U.S.C. §310a(a). J.A. at 877.[2] REA continued to operate, primarily under that temporary authority, until November 6, 1975.

On February 18, 1975, REA Express, Inc. and its affiliated companies filed petitions with the United States District Court for the Southern District of New York pursuant to the provisions of Chapter XI of the Bankruptcy Act, 11 U.S.C. §701, *et seq.* REA's attempt to solve its financial problems, however, failed and on November 6, 1975, it petitioned for, and was adjudicated a bankrupt. REA's trustee, C. Orvis Sowerwine, immediately ordered an embargo on its operations, but with one exception: the trustee permitted REA's Rexco Division to continue operations.

As the Court of Appeals noted, "Rexco amounted to little more than a brokerage business." App. A at 7a. Rexco neither owned nor operated any equipment, but rather solicited and arranged for truckload shipments over

[2] "J.A." refers to the Joint Appendix filed in the Court of Appeals in this case.

irregular routes. App. B at 51a. Between November 25, 1975, and December 11, 1975, many motor carriers filed complaints with the Commission against REA and sought a cease and desist order from the Commission to stop the Rexco operations. Those carriers asserted that the Rexco operations were not express service, and consequently, REA was not authorized to provide that type of service. The American Trucking Associations, Inc., besides asking for a cease and desist order, also sought a dismissal of REA's application for permanent authority for the hub system and a cancellation of the temporary authority. App. B at 29a.

After a hearing, the ICC on November 17, 1976, decided to issue a cease and desist order against the Rexco operations for it concluded that such operations were indeed contrary to REA's authority. App. B at 63a. However, the Commission went further and found that:

> [T]he so-called "Hub System" proceeding must be dismissed. It has been on our docket for 8 years and since the prehearing conference held on January 12, 1970, no further action has been requested by the applicant despite an initial assertion at prehearing that it would be ready to present its operating evidence in April of 1970. Rule 247(b) [*sic*] of our General Rules of Practice requires that an applicant who does not intend timely to prosecute its application shall promptly request dismissal thereof. This, we believe, places some affirmative duty on an applicant to prosecute or seek dismissal. App. B at 58a-59a.

Since the "hub system" application was dismissed, the ICC concluded, the temporary authority must be revoked for it was "conditioned upon the pendency of a corresponding permanent authority application . . . ." App. B at 60a.[3]

[3]The Commission also concluded that the temporary authority revocation was supported by good cause.

REA, petitioner[4] and others sought reconsideration, but on January 28, 1977, the Commission issued its order denying, among others, the various petitions for reconsideration. In its decision on reconsideration, the Commission reaffirmed its view that REA's failure to prosecute its "hub system" application to a conclusion within 8 years justified the dismissal. App. C at 73a.

Upon review in the Court of Appeals pursuant to 28 U.S.C. §2342, the court affirmed the Commission's orders of November 17, 1977, and January 27, 1977, and denied the petition for review. The court concluded that the ICC's interpretation of its Rule 247(f) was not unreasonable, that its decision to dismiss the "hub system" application upon that interpretation of Rule 247(f) was supported by substantial evidence and was not an abuse of discretion.

REASONS FOR GRANTING THE WRIT

I

THE PENALTY APPLIED BY THE ICC TO REDRESS A PROCEDURAL DEFECT WAS SO UNWARRANTED AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF REVIEW

For over eight years the Commission permitted REA to operate an express service which relied primarily upon a temporary authority granted under Section 210a(a) of the Interstate Commerce Act, 49 U.S.C. §310a(a). REA and its predecessor had been the historical and traditional carrier viewed as authorized to provide an express package service, and it was partly based on that history that the Commission authorized REA's restructing of its routes and its continued express operations pending resolution of the "hub system"

[4]Petitioner BRAC was not a party to the ICC proceedings, but sought leave to intervene upon reconsideration. The Commission denied that request in its decision on reconsideration. App. C at 69a-71a.

application. J.A. 877-78. The "hub system" application, however, for a variety of reasons, was not brought to a hearing and remained pending during REA's declining financial posture. Finally, when many competing motor carriers sought the discontinuance of a small part of REA's operations —the Rexco Division—the American Trucking Associations, Inc. also sought the elimination of REA's primary right to exist by seeking a cancellation of the temporary "hub system" authority.

As the record clearly shows, REA did not seek to bring the "hub system" application to a hearing for a number of reasons (*see*, App. A at 14a-15a), and, more importantly, it is respectfully submitted, the Commission did not seek to require a hearing or a dismissal of the application during the eight years that it permitted the application to be pending. App. B at 38a-42a. Rather, the Commission and REA permitted the hub system application to remain unresolved. More importantly, when the Commission did finally take action to control its docket, REA was in the process of transferring its authorities, including the duty to prosecute the "hub system" application to Alltrans Express, U.S.A., Inc., an entity which had clearly expressed an interest to proceed with the pending REA application.

While petitioner BRAC agrees that the Commission's "interpretation of its own rule or regulation is entitled to great deference by the courts" (App. A at 13a), this does not mean that the courts in reviewing an agency action based on such an interpretation may never find such a construction to be unreasonable, or indeed, to have been applied to justify a desired result. *E.g., Trans World Airlines, Inc. v. Hardison*, ____ U.S. ____ (1977) (slip op. at 11 n. 11). Moreover, even if a reviewing court should conclude that the agency's interpretation of its own rule should not be disturbed, the penalty which the agency applied for the violation of that rule or regulation may be found to have

rendered the agency action improper. *E.g., Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 129-31 (1962). In the case at bar, petitioner BRAC respectfully submits, the Court of Appeals erred in deferring to the ICC's interpretation and application of its Rule 247(f), for, it is submitted, the record shows that the Rule was used to give the desired result — *i.e.*, dismissal of the application and cancellation of the temporary authority—rather than the result being mandated by the conclusion that the Rule had been violated. Petitioner BRAC submits that when an administrative agency first reaches a conclusion, but only thereafter selects facts to rationalize that desired result, the resulting decision of that agency is arbitrary and capricious and should not be countenanced by any reviewing court.

As this Court made clear in *Gilbertville Trucking Co. v. United States, supra*, 371 U.S. at 130, the Commission has "a heavy responsibility to tailor the remedy to the particular facts of each case so as to best effectuate" the remedial purposes of the Act and to enforce our national transportation policy. This requires, it is submitted, that the remedy be designed to remove the violation; and not that the violation be chosen for its remedy.

In the case at bar, a dismissal of the "hub system" application meant that the primary source of REA's operating authority which had been relied upon for over eight years, was taken away for all practical purposes. Whatever source of income the bankrupt estate was to have received from this sale was thus lost. And more importantly, petitioner BRAC submits, whatever chances of reemployment existed in the field in which they had labored for many years was lost to over six thousand employees of the bankrupt. Such drastic results could have been avoided if the Commission, once it had interpreted Rule 247(f) to require of the applicant prompt dismissal or prosecution of its applications, then looked to the facts of the case to determine a just remedy for that violation. This the Commission did not do.

Petitioner BRAC respectuflly suggests that this Court should accept a review of this case to assure that administrative agencies use the adjudicatory process to reason from the facts to appropriate conclusions, and not, as in this case, to rationalize backwards from the desired result to supportive facts and rules.

II

THE RULINGS BELOW IMPAIR AN IMPORTANT ELEMENT OF OUR NATIONAL TRANSPORTATION POLICY

It is well settled that in rendering any decision, the Commission should be guided by our National Transportation Policy as formulated by Congress in a preamble to the Interstate Commerce Act, 49 U.S.C. preceding §1. As this Court has stated: "[T]his policy is the yardstick by which the correctness of the Commission's actions will be measured." *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 88 (1957). That policy specifically declares that:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administrated as . . . to encourage fair wages and equitable working conditions . . . . 49 U.S.C. preceeding §1.

Moreover, this Court has stated that "just and reasonable treatment" of transportation employees is an essential aid to the maintenance of an uninterrupted and efficient transportation system for employee morale suffers when the demands of justice are ignored. *United States v. Lowden*, 308 U.S. 225, 235-36 (1939). The Commission and the Court of Appeals, it is submitted, have ignored this important part of our national transportation policy.

In its decision initially cancelling REA's temporary authority, the Commission did not indicate whether it had considered the ramifications of its action upon the thousands of employees of REA, and in its decision upon reconsideration, the ICC stated, without any discussion, that petitioner BRAC in raising such an issue did not present any argument which would "warrant a result different from that found" in the Commission's original decision. App. C. at 71a. And upon review, the Court of Appeals rejected petitioner BRAC's argument that the Commission had ignored the interests of employees, by stating in a footnote that our "National Transportation Policy is not directly concerned with the problems of unemployment and creditors' rights." App. A at 24a n.16. Petitioner BRAC respectfully submits problems of unemployment and creditors' rights are indeed part of the interests of employees included within our national transportation policy, and that the Commission may not ignore such considerations in reaching a decision.

This Court has stated in *Schaffer Transportation Co. v. United States, supra,* that it is erroneous for the Commission to fail to consider all of the relevant factors in our national transportation policy in rendering a decision. While this Court will not disturb a balancing of the numerous considerations that collectively determine where the public interest lies in a particular situation, *Id.* at 92-93, it will invalidate a conclusion that did not evaluate and balance the relevant considerations. *Id.* In this case, as petitioner BRAC informed the Commission in its petition for reconsideration that:

> [T]here are approximately 15,000 employees involved (who either actively worked for REA Express in 1975 or who were on furlough with employment rights) whose average age is approximately 55 years, whose working experience

> has been largely with REA, and whose chances of employment elsewhere are minimal. J.A. at 734.

By cancelling REA's temporary authority, the ICC, without weighing the impact of its actions on those employees, destroyed any chances which those employees may have had to priority of employment with the purchaser of REA's operating rights, or reemployment with a reorganized REA.[5]

Considerations of unemployment and employment rights of employees are, it is submitted, well recognized elements of the interests of employees included within our national transportation policy. *E.g.*, Section 405(b)(1) and (4) of the Rail Passenger Service Act, 45 U.S.C. §565(b)(1) and (4). And indeed, such rights are clearly part of the consideration that employees are to be treated fairly and not to be forgotten offhandedly. This Court, it is respectfully suggested, should accept review of this case in order to prevent an important policy of Congress from being impaired and disregarded.

[5]An attempt to reorganize REA under Chapter 10 of the Bankruptcy Act was recently rejected *In re REA Holding Corp.*, 558 F.2d 1127 (2d Cir. 1977).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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December 15, 1977

APPENDIX A

OPINION OF COURT OF APPEALS

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1165—September Term, 1976.

(Argued May 23, 1977 Decided September 16, 1977.)

Docket No. 76-4278

REA EXPRESS, INC., Bankrupt, L. ORVIS SOWERWINE, Trustee in Bankruptcy,

Petitioner,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

Before:

WATERMAN and TIMBERS, *Circuit Judges,* and MEHRTENS, *District Judge.**

Petition to review orders of the Interstate Commerce Commission which (1) dismissed for lack of prosecution and application by the trustee in bankruptcy of REA Express, Inc. for permanent operating authority of a nationwide "Hub" system of express service, and (2) revoked

* Hon. William O. Mehrtens, Senior United States District Judge for the Southern District of Florida, sitting by designation.

the temporary operating authority previously granted for such service.

Petition denied; orders affirmed.

JOHN M. CLEARY, Wash., D.C. (John K. Maser III, and Donelan, Cleary, Wood & Maser, Wash., D.C.; Donald L. Wallace, and Whitman & Ransom, New York, N.Y.; Marcus & Angel, New York, N.Y., on the brief), *for Petitioner REA Express, Inc., Bankrupt, L. Orvis Sowerwine, Trustee in Bankruptcy.*

J. WILLIAM CAIN, JR., Wash., D.C. (Jack R. Turney, Jr. and Robert R. Redman, Wash., D.C.; Tibor Sallay, White Plains, N.Y., on the brief), *for Intervenor Alltrans Express U.S.A., Inc. in support of Petitioner.*

JOHN O'B. CLARKE, JR., Wash., D.C. (James L. Highsaw, and Highsaw, Mahoney & Friedman, Wash., D.C.; David J. Fleming, and Reilly, Fleming & Reilly, New York, N.Y.; William J. Donlon, Rosemont, Illinois, on the brief), *for Intervenor Brotherhood of Railway and Airline Clerks in support of Petitioner.*

HENRI T. RUSH, Atty., ICC, Wash., D.C. (Mark L. Evans, Gen. Counsel, ICC, and Charles H. White, Jr., Assoc. Gen. Counsel, ICC, Wash., D.C.; Donald I. Baker, Asst. Atty. Gen., and Lloyd John Osborn, Atty., Dept. of Justice, Wash., D.C., on the brief), *for Respondents United States of America and Interstate Commerce Commission.*

JOHN W. BRYANT, Detroit, Mich., and TODD A. PETERMAN, Wash., D.C. (Richard H. Streeter, Edward K. Wheeler, and Wheeler & Wheeler, Wash., D.C.; Eames, Petrillo and Wilcox, Detroit, Mich.; Phillip Robinson, and Robinson, Felts, Starnes & Nations, Austin, Tex.; Nelson J. Cooney, Wash., D.C.; Daniel C. Sullivan, and Singer & Sullivan, Chicago, Ill., on the brief), *for Intervening Respondents in support of the Interstate Commerce Commission.*

TIMBERS, *Circuit Judge:*

On this petition to review orders[1] of the Interstate Commerce Commission (the Commission), the essential questions are whether the Commission acted arbitrarily and capriciously and abused its discretion in dismissing for want of prosecution the application of the trustee in bankruptcy of REA Express, Inc. (REA) under §206(a)(1), of the Interstate Commerce Act (the Act), 49 U.S.C. §306(a)(1) (1970),[2] for permanent operating authority of a nationwide "Hub" system of express service and at

1 The two orders of the Commission which are the subject of the instant petition to review were entered November 17, 1976 and January 27, 1977 in consolidated Docket No. MC-C-8862, *Brada Miller Freight System, Inc.* v. *Rexco, Inc. and REA Express, Inc.* (unreported).

2 §206(a)(1) of the Interstate Commerce Act, 49 U.S.C. §306(a)(1) (1970), in relevant part provides:

"Except as otherwise provided in this section and in section 310a of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operations on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations. . . ."

the same time in revoking the temporary authority previously granted to REA under §210a(a) of the Act, 49 U.S.C. §310a(a) (1970).[3]

We hold that the Commission did not act arbitrarily and capriciously and did not abuse its discretion. Accordingly we deny the petition to review and affirm the order of the Commission.

I. Facts and Prior Proceedings

(A) *REA and the Hub System*

"Express service", as defined by the Commission, entails the expedited carriage of goods upon firmly established schedules. The express carrier, whose services command premium rates, also must provide special handling for small parcels. *REA Express, Inc., Application for ETA*, 117 M.C.C. 80, 88-89 (1971); *Railway Express Agency, Inc., Extension-Nashua, N.H.*, 91 M.C.C. 311, 324 (1962). During the first half of this century express service was provided as an adjunct of the operations of the nation's railroads. In 1929 the railroads joined together to establish Railway Express Agency, Inc. (Railway Express), a non-profit agency designed to operate all express services provided by the railroads under their joint ownership and control. The non-profit arrangement continued until 1969. In that

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3 §210a(a) of the Interstate Commerce Act, 49 U.S.C. §310a(a) (1970), provides:

> "To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter."

year the participating railroads, which were dissatisfied with Railway Express' continuous losses, extricated themselves from its ownership. *REA Express, Inc.* v. *Alabama Great Southern Railroad Co.*, 343 F.Supp. 851 (S.D.N.Y. 1972), *aff'd*, 412 U.S. 934 (1973). REA, the bankrupt herein, emerged as an independent company which carried on the business of Railway Express.

Upon the organization of REA in 1969, it provided express service with a routing system significantly different from the railroad oriented system which its predecessor had operated. The steady decline in railroad passenger service after World War II had forced Railway Express into increasing reliance on supplementary operations by motor carrier. By 1962 it had acquired nearly 1,700 separate motor carrier operating rights from the Commission. These piecemeal acquisitions left Railway Express with an uncoordinated and unmanageable system of interlocking rail and motor routes. It consequently decided that a fundamental restructuring of its routing system was necessary.

In 1968 Railway Express submitted to the Commission under §206 of the Act an application for permanent operating authority for a "Hub" system of operations. The salient feature of such system was its selection of 24 central points or hubs for the dispatch and receipt of traffic. Each hub was connected with each other hub by a regular motor route or rail line-haul route. A "satellite" area, served exclusively by motor carrier, surrounded each hub. All traffic to and from locations within the satellite area moved via the hub city. Railway Express, pursuant to §210a(a) of the Act, made the usual application for temporary authority pending the Commission's action on its application for permanent authority. The Commission found that Railway Express met the "immediate and ur-

gent need" requirement of §210a(a) for its Hub service and accordingly granted the temporary authority. *Saginaw Transfer Co.* v. *United States,* 312 F.Supp. 662 (E.D. Mich. 1970) (three-judge court); *Estes Express Lines* v. *United States,* 292 F. Supp. 842 (E.D. Va. 1968) (three-judge court), *aff'd,* 394 U.S. 718 (1969) (per curiam) (grant of temporary authority sustained).

Railway Express commenced Hub operations in 1968 under the temporary authority. Its successor, REA, took no effective steps thereafter in prosecuting the permanent authority application. It relied on the temporary authority granted to Railway Express for continued Hub operations during the entire period of REA's existence. Once the Hub system was placed in operation under the temporary authority, it proved a disappointment to REA. As a result, in 1971 REA sought to abandon the Hub system and to replace it with a new system of irregular route service. In its new application for temporary authority REA represented that, despite strenuous efforts to implement the Hub system, it nevertheless had proved both "costly and inefficient for REA, and inadequate in providing service to the public." On August 9, 1971 the Commission denied the new application on the grounds that no immediate and urgent need had been demonstrated and the irregular route service proposed would be inconsistent with the concept of express service.

Although REA carried on under the temporary Hub authority, its actual operations departed significantly from those contemplated in the 1968 application. Referring to Hub operations in general, the Commission stated in its 88th Annual Report at 54-55 (1974):

> "The [Hub] concept proved to be inefficient, necessitating considerable exceptions to the basic operating plans. . . .

> [T]he system today bears little resemblance to the original concept. . . ."

(B) *REA's Bankruptcy and the Rexco Division*

REA's operations continued to decline. As a result of the recession and other factors,[4] on February 18, 1975 it filed a petition for an arrangement under Chapter XI of the Bankruptcy Act in the Southern District of New York. The company continued operations as the debtor in possession until November 6, 1975. On that date it was adjudicated a bankrupt and ordered liquidated. Regular express services ceased the following day. Since then liquidation has been substantially completed. REA no longer has any operational capability.

Backing up for a moment to August 1975—during the period of REA's unsuccessful reorganization proceeding—we come to the event which precipitated the Commission's proceedings here under review: establishing the Rexco Division of REA. Rexco amounted to little more than a brokerage business. Independent agents stationed at various locations east of the Rockies and acting on a commission basis solicited truckload traffic from shippers and then arranged for carriage in owner-operated trucks. A small Rexco office near Philadelphia solicited some business, but its chief function was billing shippers and paying agents and owner-operators. Rexco did not own or operate

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4 In 1946 REA handled 235 million surface shipments. By 1971 this figure had declined 94% to 14.5 million shipments. In 1973 the figure dropped to 9.99 million, in 1974 to 8.96 million. Revenues from surface traffic, which amounted to $350 million in 1965, had declined to $168.5 million in 1974.

REA's air express operations, which accounted for a substantial portion of its revenues, also declined. The number of shipments fell from 6.54 million in 1973 to 4.81 million in 1974. Revenues dropped from $107.4 million to $103.2 million during the same period.

any equipment. It employed no drivers. It exerted little direct control over the operations carried on in its name. It failed to comply with the regular-route restrictions in REA's operating authorities and with the governing REA tariff. And by dispensing with fixed schedules and limiting itself to truckload shipments, Rexco lost any resemblance to the "express service" which REA was authorized to perform.

(C) *Proceedings before the Commission and the Alltrans Application*

Particularly on longer hauls, Rexco undersold competing irregular-route carriers. Its business grew rapidly. Apparently because Rexco was the only profitable REA operation, the REA trustee in bankruptcy on November 10, 1975 amended his embargo notice so as to exempt Rexco from the embargo on all REA operations which the trustee, upon taking office three days earlier, had placed on all traffic tendered to REA. By December 11, 1975, 18 of the motor carriers whose business Rexco had been diverting responded with complaints filed with the Commission seeking a cease and desist order against Rexco's unlawful operations. On December 1, American Trucking Associations, Inc. (ATA), one of the intervening respondents herein, filed with the Commission a petition seeking dismissal of the still-pending 1968 application for permanent Hub authority and concomitant revocation of the 1968 temporary authority for failure to prosecute the application in violation of Rule 247(f) of the Commission's General Rules of Practice, 49 C.F.R. §1100.247(f) (1976). On April 5, 1976 the Commission entered an order consolidating all proceedings arising from the motor carriers' complaints and the ATA petition. *Brada Miller Freight System, Inc.* v. *Rexco, Inc. and REA Express, Inc.*, Docket No. MC-C-8862.

On July 27, 1976, one day before the Commission set a date for oral hearings in the consolidated proceedings against REA, a bankruptcy judge in the REA Express, Inc. bankruptcy proceedings, approved an agreement between the REA trustee and intervenor Alltrans Express U.S.A., Inc. (Alltrans) for the purchase of REA's outstanding permanent and temporary authorities. The agreement provided for down payment of $2.5 million and a guaranteed minimum rental and purchase price of $9.6 million. It also contemplated that by September 25, 1976 Alltrans would file applications with the Commission for transfer of REA's authorities pursuant to §§5(2)(a) and 210a(b) of the Act, 49 U.S.C. §§5(2)(a) and 310a(b) (1970).[5] See *In the Matter of REA Holding Corporation (Manning* v. *Sowerwine)*, —— F.2d ——, —— (2 Cir.

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5 §5(2)(a) of the Interstate Commerce Act, 49 U.S.C. §5(2)(a) (1970), in relevant part provides:

"It shall be lawful, with the approval and authorization of the Commission, . . .

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise. . . ."

§210a(b) of the Interstate Commerce Act, 49 U.S.C. §310a(b) (1970), in relevant part provides:

"Pending the determination of an application filed with the Commission for approval . . . of a purchase, lease, or contract to operate the properties of one or more motor carriers, the Commission may, in its discretion, and without hearings or other proceedings, grant temporary approval . . of the operation of the motor carrier properties sought to be acquired by the person proposing . . . to acquire such properties . . . if it shall appear that failure to grant such temporary approval may result in destruction of or injury to such motor carrier properties sought to be acquired, or to interfere substantially with their future usefulness in the performance of adequate and continuous service to the public."

1977), slip op. 4993, 4996-97 (July 27, 1977) (dismissal of creditors Chapter X petition affirmed).

The essential elements of this agreement were the application for permanent Hub authority and the temporary authority, the continuing validity of which already had been drawn into question by ATA's petition of December 1, 1975. To assure the success of the Alltrans contract, the trustee therefore sought to delay the consolidated proceedings. On July 28 the Commission set the matter for hearing beginning August 30 before an Administrative Law Judge (ALJ). The trustee responded with a petition requesting a postponement of at least 45 days. He contended that adjudication of ATA's petition would frustrate the imminent transfer applications by Alltrans under §§5(2)(a) and 210a(b) and that priority consideration of the transfer applications would "moot" the questions raised by ATA's petition. On August 24 the Commission denied the trustee's petition.

On August 30 the hearing commenced as scheduled. It extended through September 22. On October 15 the Commission announced that in order to expedite proceedings it would dispense with an initial decision by the ALJ and that the full Commission would decide the matter on the record as certified by the ALJ[6] and on the briefs of the parties. It did so on November 17 by filing its report and order to which the instant petition to review is chiefly addressed.

The Commission held that the Rexco operation was outside the definition of express service and beyond the scope of REA's operating authorities. Accordingly it directed that a cease and desist order be entered prohibiting con-

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6 In certifying the record to the Commission the ALJ observed:

"The statements and demeanor of all witnesses testifying at the hearing did not demonstrate any instance which would subject the credibility of such witnesses to question."

tinued operation of Rexco by the trustee. With respect to ATA's petition for dismissal of the application for permanent Hub authority, the Commission found

> "that applicant REA . . . has failed to prosecute its application in a timely manner; that applicant is not shown to be capable of prosecuting the application; that attempted prosecution of the application would not appear likely to result in a feasible operation consistent with the public interest and the national transportation policy or required by the public convenience and necessity such that any appropriate authority would be issued as a result of such prosecution . . . ."

Accordingly the Commission ordered that the application for permanent authority be dismissed and that the temporary authority be revoked.

The Commission also held that there were circumstances which justified revocation of the temporary authority independent of the dismissal of the permanent application for lack of prosecution. Referring to its finding that the trustee's Rexco operations were in willful violation of the law, the Commission concluded that "REA, as it now exists, is not fit to conduct proper and safe operations." This in turn was held to constitute good cause within the meaning of §210a(a) of the Act for revocation of the temporary authority.

With respect to the cease and desist provisions of the Commission's order, the trustee immediately complied with them. He did not seek reconsideration of that part of the order or the findings of illegal operations upon which it was based. He does not challenge the cease and desist order provisions on the instant petition to review. With respect to the provisions of the Commission's order which

dismissed the application for permanent Hub authority and revoked the temporary authority, the trustee did file a petition for rehearing. On January 27, 1977 the Commission entered an order adhering to its findings, report and order of November 17 and denied the various petitions and motions before it, including that of the trustee for rehearing referred to above.

The instant petition to review is addressed to the Commission's orders of November 17, 1976 and January 27, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §2342(5) (Supp. V. 1975), *amending* 28 U.S.C. §2343 (1970). On January 5, 1977 we stayed the Commission's order of November 17, 1976 pending judicial review and ordered an expedited briefing and argument schedule.

Essentially the trustee challenges the dismissal of its application for permanent Hub authority and the revocation of the temporary authority previously granted. Various intervenors support the positions of either the trustee or the Commission. For the reasons below we deny the petition to review and affirm the orders of the Commission.

II. ICC Rule 247(f)

Critical underpinning for the Commission's dismissal of the trustee's application for permanent Hub authority is Rule 247(f) of the Commission's Rules of Practice, 49 C.F.R. §1100.247(f) (1976), which in relevant part provides:

> "An applicant who does not intend timely to prosecute its application, shall promptly request dismissal thereof. Failure to prosecute an application under procedures ordered by the Commission will result in dismissal thereof. . . ."

In the record of the Hub system proceeding the Commission found a basis for faulting REA for inaction under

Rule 247(f). At a pre-hearing conference on January 12, 1970 REA represented that it would be prepared to present its operating evidence in April of that year. Thereafter REA requested no further action from the Commission. As the Commission found in its November 17, 1976 report, however, REA in applying for irregular route authority in 1971 "specifically expressed its intention to dismiss the Hub proceeding", and thereby "in effect . . . repudiated that approach. . . ." [7]

The Commission interpreted its Rule, which requires that an applicant who does not intend to prosecute *promptly* to request dismissal, as placing "some affirmative duty on an applicant to prosecute or seek dismissal." Since REA had permitted 8 years to pass without doing either—but indeed in its 1971 application affirmatively had demonstrated its intent *not* to prosecute—the Commission concluded that dismissal was warranted under the Rule.[8] We agree. No citation of authority is needed for the elemental proposition that an administrative agency's interpretation of its own rule or regulation is entitled to great deference by the courts. We accord that deference to the ICC's interpretation here of its Rule 247(f).

III. Lack of Substantial Evidence Claim

The trustee mounts a massive attack upon the Commission's interpretation of its own Rule 247(f) and argues

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7 The Commission also found that

". . . REA would have failed much sooner had it not been for the forbearance of this Commission . . . in giving REA every possible leeway and not forcing it to go immediately to hearing on matters it was not in a position to prove."

8 The Commission also noted that the fact of REA's bankruptcy and subsequent liquidation removed any need to excuse REA's conduct and to permit its application to remain pending because of the public interest or the National Transportation Policy. 54 Stat. 899 (1940).

that there is no substantial evidence in the record to support the Commission's dismissal for lack of prosecution of the trustee's application for permanent Hub authority. Again we disagree.

The trustee contends that all of the delay in the Hub proceeding after 1970 was attributable to procrastination on the part of the Commission. He says that REA stood ready to proceed after the January 1970 pre-hearing conference and made no representations to the contrary. Upon this premise he concludes that the failure to commence the hearing in April and to take any action whatsoever in the case for four years should be charged to the Commission.

The trustee seeks to buttress this conclusion with a letter dated August 23, 1974 by a Commission employee responding to a request for information regarding the Hub case. It states that due to the "unusual nature" of the proceeding no estimated "processing time" could be given. The trustee argues that this amounts to an admission of culpability on the part of the Commission for the delay. He also relies upon an order entered sua sponte by the Commission on January 9, 1975 consolidating the Hub proceeding with several other pending REA applications. From this the trustee infers Commission recognition of the application's continuing "viability."

We have carefully considered these and other facts relied on by the trustee in support of his claim that the Commission's finding that REA did not intend timely to prosecute its application within the meaning of Rule 247(f) is not supported by substantial evidence. We are not persuaded by the trustee's claim. The events of 1970 at best are ambiguous aids in the task of allocating blame for the delay. Moreover they were stripped of whatever probative force they might otherwise have had when REA in 1971 disrupted the status quo in the Hub proceeding

with its application for irregular route authority. After the 1970 delay, rather than returning and requesting that the Commission move along with the Hub proceeding, REA requested that the entire matter be dropped. That action, together with REA's subsequent silence for many years and its deteriorating financial condition, certainly permits, if it does not compel, the inference that REA had no intention of pursuing the Hub application to a conclusion.[9] The letter of 1974 and the order of 1975, viewed in the familiar context of an administrative proceeding, amount to nothing more than isolated routine administrative actions. They neither rebut the inference of REA's intent not to prosecute its application nor do they fix responsibility on the Commission for the delay.[10]

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9 The trustee, relying on REA's continuous operations under the Hub system until 1975, challenges as arbitrary and capricious the Commission's characterization of the 1971 application as a "repudiation" of the Hub concept. According to the trustee REA had no choice but to adhere to Hub.

This is beside the point. REA's statements of repudiation in the 1971 application are highly probative on the question of intent to prosecute the *permanent* application. An intent not to prosecute the permanent application could have been, and probably was, consistent with an intent to continue Hub operations under the temporary authority for an indefinite period.

10 Implicit in the trustee's argument that responsibility for pressing the Hub proceeding was that of the Commission is the notion that the Commission's inaction estops it from relying on its Rule 247(f). Aside from the highly dubious proposition that a government agency may be equitably estopped, see *Mitchell Bros. Truck Lines* v. *United States*, 225 F.Supp. 755 (D. Ore. 1963) (three-judge court), *aff'd*, 378 U.S. 125 (1964) (per curiam); *Sims Motor Transport Lines, Inc.* v. *United States*, 183 F.Supp. 113, 119 (N.D. Ill. 1959) (three-judge court), clearly there is no basis whatsoever for suggesting anything even akin to estoppel on the part of the Commission here. There was no representation by the Commission upon which REA justifiably could have relied. Far from suffering any detriment from the continued pendency of the application, REA reaped the benefit of undisturbed continued operation of the temporary authority for many years.

In any event the trustee cites no authority for the proposition that the responsibility for pressing the Hub application was on the Com-

We hold on the record as a whole that there was substantial evidence to support the Commission's dismissal of the application on the ground that REA did not intend to prosecute its application within the meaning of Rule 247(f).

This does not end our inquiry with respect to the trustee's lack of substantial evidence claim. He also challenges the substantiality of the evidence from another angle. He suggests that the Commission's own decisions under Rule 247(f) limit dismissal for failure to prosecute to situations where the applicant has failed to comply with a procedural order of the Commission, citing *New Rochelle Moving & Storage—Contract Carrier Application*, 111 M.C.C. 418 (1970); *C. E. Carroll Common Carrier Application*, 3 M.C.C. 393 (1937); *Wellington Well Watkins Contract Carrier Application*, 2 M.C.C. 309 (1937); *Traffic Motor Express Common Carrier Application*, 1 M.C.C. 419 (1937). Since REA did not violate any Commission order, so the argument goes, stare decisis precludes application of Rule 247(f) under the circumstances of this case. Once again we disagree.

The cases on which the trustee relies were decided under the second sentence of Rule 247(f), see p. 6000 *supra*, which deals explicitly with noncompliance with Commission orders. The issue here, to which the Commission opinion is addressed, involves the interpretation of the first sentence of Rule 247(f) which imposes a duty on the applicant to procure dismissal when it no longer intends to prosecute its application. The Commission, whose interpretations of its own rules are entitled to great weight, reads the first two sentences of Rule 247(f) in the dis-

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mission. Rule 247(f) is the only authority in point. We agree with the Commission that under that Rule the responsibility for pressing the application is on the applicant.

junctive. We cannot say that this interpretation is incorrect. Under the trustee's contrary construction the second sentence would modify the first and thereby effectively repeal it.[11] Furthermore, the first sentence, by providing a means to enable the Commission to correct abuses of its temporary authority procedure, functions in aid of the Act's overall regulatory scheme of temporary and permanent authorities.

We hold that a finding of noncompliance with an order of the Commission is not a prerequisite to dismissal of an application for failure to prosecute under Rule 247(f).

IV. Abuse of Discretion Claim

We turn next to the trustee's principal challenge to the Commission's orders under review. The trustee asserts that the Commission abused its discretion in dismissing the Hub application under Rule 247(f) before acting on the pending Alltrans applications for transfer of REA's authorities pursuant to §§5(2)(a) and 210(b) of the Act.

In its report and order of November 17, 1976 and in its order of January 27, 1977 the Commission expressly and in detail took into account the pending Alltrans applications, as well as the claims of Alltrans as an intervenor in the instant proceedings. In acting first on the REA application, however, we believe that the Commission acted well within its discretion. In short, we agree with the Commission's conclusion set forth in its January 27, 1977 order that "in these circumstances, the disposition [of the REA application for permanent Hub authority] properly

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11 We note that unlike the second sentence the first does not provide explicitly for dismissal at the instance of the Commission. The Commission however obviously was entitled to infer such power. Otherwise it would lack any means of enforcing the first sentence. *Cf. Link v. Wabash R. Co.*, 370 U.S. 626 (1962) (inherent power of federal court to dismiss sua sponte for failure to prosecute).

preceded disposition of the applications of Alltrans noted above".

The crux of the Commission's decision of November 17, 1976 in dismissing REA's application for permanent Hub authority was its recognition of "the probability that a bankrupt *and* liquidated carrier will not and cannot prosecute its outstanding applications." (emphasis that of the Commission). In support of its revocation of REA's temporary authority the Commission noted that REA "as it now exists, is not fit to conduct proper and safe operations." These findings clearly support the Commission's conclusion that "dismissal of this application will not be inconsistent with the public interest, the public convenience and necessity, or the National Transportation Policy. . . ."

The trustee urges that the Alltrans applications were relevant to these findings and conclusions of the Commission. He argues that absent an adjudication of the Alltrans applications there is an inadequate factual basis in the record for the Commission's conclusions that the REA application would not be prosecuted, that REA was unfit, and that dismissal of that application would have no adverse impact on the public interest and the National Transportation Policy. Accordingly the trustee invites us to hold that the Commission's decision that disposition of the REA application properly preceded disposition of the applications of Alltrans constituted an abuse of discretion and was arbitrary and capricious within the meaning of §10(e)(2)(A) of the Administrative Procedure Act, 5 U.S.C. §706(2)(A) (1970).[12] We decline the invitation.

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12 Alltrans as intervenor supports the trustee's position that the Commission should not have dismissed the Hub application without first considering the Alltrans applications. It argues that "orderly administrative process" required this because "if the Alltrans' application[s] had been processed . . . the matters now before this Court *would be rendered moot.*" (emphasis that of Alltrans' counsel). As authority for this argument Alltrans relies on the broad provisions of §17(3)

In doing so however we have carefully weighed the competing considerations. In its decision in the instant case the Commission recognized that dismissal of the Hub application must not be "inconsistent with the public interest, the public convenience and necessity, or the National Transportation Policy. . . ." The existence of a fit and willing substitute applicant, under appropriate circumstances, might be said to have a direct bearing on the inquiry. We also are mindful that, since an application or temporary authority which has ceased to exist cannot be transferred, the decision against the trustee here as a practical matter forecloses further consideration of Alltrans' applications for transfer.

On the other hand docket management is a discretionary matter as to which courts virtually never substitute their judgment for that of an administrative agency. E.g., *FCC* v. *WJR*, 337 U.S. 265, 272 (1949); *Peninsula Corp. of Seaford, Delaware* v. *United States*, 60 F.Supp. 174 (D.D.C. 1945) (three-judge court). Having said this, we recognize the exceptional situation where two mutually exclusive, bona fide applications should be considered together. See *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1946). And we further recognize more broadly that in an appropriate case considerations of administrative convenience, expedition and fairness may come down so strongly on the side of consolidated consideration of interrelated questions that failure to consolidate would amount to an abuse of discretion. See *A. L. Mechling Barge Lines, Inc.* v. *United States*, 376 U.S. 375, 382-86 (1964).

With these principles in mind we turn to the instant case to determine whether the Commission was justified in de-

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of the Act, 49 U.S.C. §17(3) (1970), which provides that the Commission's proceedings shall be conducted "in such manner as will best conduce to the proper dispatch of business and to the ends of justice. . . ."

clining in effect to permit Alltrans to stand in the shoes of REA. The Commission gave two reasons for its action. First, such substitution would have permitted REA to "'transfer away' redress for its breaches of the Act and this Commission's rules and regulations. . . ." Second, "if there is, in fact, [the] need for a nationwide general express service" which Alltrans claims, §210a(a) provides "a means by which [such] immediate and urgent need for . . . service can be satisfied by willing carriers." In other words, a new application for temporary authority would provide an adequate remedy to Alltrans if shown to be in the public interest.

We find the Commission's explanation persuasive—especially when §210a(a) and Rule 247(f) are viewed in the context of the Act's overall regulatory scheme.

The Act reflects the determination of Congress that regulation of competition among carriers is necessary in the public interest. As one part of its regulatory pattern, the Act protects the motor carrier industry from overcompetition and preserves standards of safety and financial responsibility within the industry by regulating entry. Under §§205-209 of the Act, 49 U.S.C. §§305-309 (1970), entry ordinarily may be authorized by the Commission only after full adversary proceedings. See *American Form Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 543-44 (1970) (Brennan, *J.*, dissenting). The temporary authority provided in §210a(a) is a strictly limited exception to this regulatory pattern. It was designed to provide the Commission with a swift and procedurally simple means of responding to urgent transportation needs. *Id.* at 539 (majority opinion). Temporary authority is in the nature of preliminary relief. It necessarily is granted without a thorough investigation into the public need, the carrier's fitness, or the interests of competing carriers. E.g., *Mobile*

Home Express, Ltd. v. *United States*, 354 F.Supp. 701, 706 (W.D. Okla. 1973) (three-judge court); *HC&D Moving and Storage Co.* v. *United States*, 317 F.Supp. 881 (D. Haw. 1970) (three-judge court) (per curiam).[13]

In the instant case the temporary authority had been in existence for 8 years. REA had continued operations under it in violation of Rule 247(f). In refusing to permit Alltrans to stand in the shoes of REA, the Commission was enforcing orderly utilization of its regulatory procedures. If the Commission were held to lack discretion to prohibit renewal of temporary authorities subject to dismissal for violation of Rule 247(f), the limited function of §210a(a) would be subverted. Carriers could acquire and misuse temporary authorities secure in the belief that such authorities could be put on the market if the Commission or their competitors proceeded against them.

In *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115 (1962), the Supreme Court relied on a similar deterrent rationale in sustaining the Commission's disapproval of a merger under §5(2) of the Act on the ground that the two carriers had violated the control provisions of §5(4) prior to their merger application.[14] We think that the Court's

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13 The courts have given the Commission broad discretion in making §210a(a) determinations. E.g., *Garnett Freight Lines, Inc.* v. *United States*, 540 F.2d 450 (9 Cir. 1976) (per curiam); *Land-Air Delivery, Inc.* v. *United States*, 371 F.Supp. 217 (D. Kan. 1973) (three-judge court); *Schenley Distillers Corp.* v. *United States*, 50 F. Supp. 491, 496 (D. Del. 1943) (three-judge court).

14 For the relevant parts of §5(2) of the Interstate Commerce Act, 49 U.S.C. §5(2) (1970), see note 5, *supra*.

§5(4) of the Interstate Commerce Act, 49 U.S.C. §5(4) (1970), in relevant part provides:

"It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any transaction within the scope of subdivision (a) of paragraph (2) of this section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether

view of the impact of the §5(4) violation in *Gilbertville* is equally applicable to the Rule 247(f) violation here:

> "[E]ven an automatic rule is not necessarily arbitrary. . . . §5(4) is integral to the success of the regulatory scheme. To approve a merger in the face of a §5(4) violation may encourage others whose merger may not be consistent with the public interest to either present the Commission with a *fait accompli* or avoid its jurisdiction altogether. . . . [I]f such practices were encouraged, [the Commission's] 'administration of the statute in the public interest would be seriously hindered if not defeated.' . . ." *Id.* at 128.

See also *Lombard Bros. Inc.* v. *United States*, 226 F.Supp. 905, 908 (D. Conn. 1964) (three-judge court) (Swan, *J.*).

Under *Gilbertville*, however, the Commission's interest in enforcing compliance with the Act in some circumstances may be outweighed by the public interest in granting the application. 371 U.S. at 129. The trustee urges here that the Commission only peripherally considered the public interest, preferring to relegate Alltrans to a new application under §210a(a).

We are satisfied, however, upon a close comparison of the provisions of §§210a(a) and 210a(b), see notes 3 and 5 *supra*, that under the circumstances of this case the Commission acted well within its discretion. Under §210a(a) existing service is *not* presumed and the applicant must show an "immediate and urgent need" for service. On the other hand, §210a(b), under which the Alltrans transfer

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directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. . . ."

applications would proceed, provides for temporary authority pending approval of a merger or a transfer of authorities. Since an authority already exists in a §210a(b) case, basic public need for the service in question is presumed; the critical question in such a case is whether an interim interruption in service will injure or destroy the properties to be transferred or "interfere substantially with their future usefulness in the performance of adequate and continuous service to the public."

In the instant case the Commission did make certain findings which bear on the §210a(b) question referred to above.[15] It is arguable, however, that the Commission's findings did not conclusively show that the proposed transfer to Alltrans and continuation of Hub service was against the public interest. But the procedure proposed by Alltrans also would fail to result in an adjudication of the question of public interest in the transfer and continuation. The inquiry under §210a(b) is not intended to go that far. The section presumes that the full adversary hearings on the issue of public convenience and necessity which the Hub authority never has undergone already have occurred. For its public interest anchor therefore Alltrans would have to fall back on the Commission's summary 1968 finding of "immediate and urgent need." The record in this case however provides ample justification for the Commission's refusal to presume the continued existence of the conditions which warranted its action in 1968.

We hold that the Commission did not abuse its discretion in dismissing the Hub application under Rule 247(f)

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15 For example it found that other carriers had expanded to fill the void left by RFA. Obviously this finding is correct and is supported by the record. The difficulty is that it is not a complete answer to the question of public interest in continued Hub operations. Doubtless some expansion has occurred. But the proceedings before the Commission were not directed to the determination of the precise extent of such expansion and the concomitant question of the extent of the need for renewed express service.

without considering on their merits the Alltrans transfer applications. REA's violation of Rule 247(f) gave rise to a substantial enforcement interest. The circumstances of REA's collapse and the complete cessation of actual service under the Hub authority for one year preceding the decision in this case amply justified the Commission in requiring a minimal showing of public interest under §210a(a) as a prerequisite to Alltrans' resumption of Hub services pending adjudication of the application for permanent authority.[16]

This holding necessarily disposes of the trustee's final contention—that he should have been held to the lesser burden of proof of §210a(b). This case presented the Commission with questions of first impression regarding §§210a(a) and 210a(b). There is no rule that requires the Commission to apply the provisions of §210a(b) to parties who seek to transfer temporary authority no matter what the circumstances. Such a rule would permit temporary authority to become a functional substitute for permanent authority and would distort the statutory scheme. The Commission moreover has a continuing duty to reopen and reconsider its decisions regarding temporary authorities. *Braswell Motor Freight, Inc.* v. *United States*, 336 F.Supp. 709, 712 (C.D. Cal. 1971) (three-judge court). The Com-

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16 Intervenor Brotherhood of Railway and Airline Clerks (BRAC) contends that the Commission's orders violate the National Transportation Policy because the Commission failed to "collect facts" about employee interests. This contention is without merit. The Commission obviously was aware of the unemployed status of REA's employees. BRAC fails to suggest any material facts which further inquiry might have developed. Moreover the National Transportation Policy is not directly concerned with the problems of unemployment and creditors' rights. Cf. *Luckenbach S.S. Co.* v. *United States*, 122 F.Supp. 824 (S.D.N.Y.) (three-judge court) (A. Hand, *J.*), *aff'd*, 347 U.S. 984 (1954) (per curiam).

Schaffer Transportation Co. v. *United States*, 355 U.S. 82 (1957), on which BRAC relies, is wholly irrelevant.

mission did not abuse its discretion in doing so here in the context of a proceeding which sought dismissal under Rule 247(f) of an application for permanent authority.

The trustee relies on *Eagle Motor Lines, Inc.* v. *ICC*, 545 F.2d 1015 (5 Cir. 1977), for the proposition that the shift in the burden of proof makes a fresh application an inadequate remedy for improper summary revocation of operating authority. Suffice it to say that that case arose under entirely different circumstances, under a different section of the Act and is wholly unpersuasive here.

Temporary authority can exist only pursuant to a pending application for permanent authority. Accordingly the Commission's dismissal of the Hub application for permanent authority constituted "good cause" under §210a(a) for revocation of the Hub temporary authority. Since we affirm the Commission's dismissal under Rule 247(f), we find it neither necessary nor appropriate to reach the trustee's objections to the Commission's independent grounds for revocation of the temporary authority.

We have carefully considered all of the claims of the trustee, as well as those of the intervenors who support the trustee, and we find them without merit.

We vacate our stay of January 5, 1977 and order that the mandate issue forthwith.

Petition denied; orders affirmed.

APPENDIX B

REPORT AND ORDER OF COMMISSION

[Service Date: Nov. 19, 1976]

INTERSTATE COMMERCE COMMISSION

No. MC-C-8862[1]

BRADA MILLER FREIGHT SYSTEM, INC., v.
REXCO, INC. AND REA EXPRESS, INC.

Decided November 17, 1976

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1. In the complaint proceedings, defendant found to be engaged in described operations beyond the specific scope of its certificates and its temporary authority. Cease and desist order entered.

2. In the petition proceedings, the permanent application found not to have been appropriately prosecuted and good cause found for termination of the temporary authority, and the permanent application dismissed and the temporary authority revoked.

John W. Bryant, Wallace N. Nations, Todd A. Peterman, Gary W. Sawyer, Richard H. Streeter, and *Daniel C. Sullivan* for complainants, petitioners, and intervenors in support of the complainants and petitioners.

John M. Cleary, John K. Maser III, and *Donald L. Wallace* for the defendant-applicant.

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[1]This decision also embraces No. MC-C-8864 Schneider Transport, Inc. v. REA Express, Inc., No. MC-C-8867 American Trucking Associations, Inc. v. REA Express, Inc., No. MC-C-8874 Associated Truck Lines, Inc., et al v. REA Express, Inc., No. MC-66562 (Sub-No. 2345) (Part No. 181), REA Express, Inc. — Petition of American Trucking Associations, Inc., for Dismissal of Application, and No. MC-66562 (Sub-No. 2308 TA), REA Express, Inc. — Petition of American Trucking Associations, Inc., for Cancellation of Temporary Authority.

Bernard A. Gould and *Michael N. Nafpliotis*, for the Bureau of Enforcement, Interstate Commerce Commission.

J. William Cain, Jr., and *Robert R. Redmond* for intervener in opposition to relief requested.

REPORT AND ORDER OF THE COMMISSION

BY THE COMMISSION:

Due and timely execution of our functions under section 17 of the Interstate Commerce Act imperatively requires the omission of the Administrative Law Judge's initial decision. Requested findings not discussed in this report nor reflected in our findings have been considered and found not justified or their resolution not necessary for the appropriate disposition of these proceedings.

By separate complaints filed November 25, 1975, November 26, 1975, December 5, 1975, and December 11, 1975, respectively, Brada Miller Freight System, Inc.; Schneider Transport, Inc.; American Trucking Associations, Inc.,; and Associated Truck Lines, Inc., et al.,[2] seek a cease and

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[2]Other specific complainants or interveners represented at the hearing were: Allegheny Corporation doing business as Jones Motor; Artim Transportation System, Inc.; Associated Transport, Inc.; B&P Motor Express, Inc.; Eastern Express, Inc.; George Transfer and Rigging Company; Great Lakes Express Company; Holland Motor Express, Inc.; Home Transportation Company, Inc.; Interstate Motor Freight System; Jones Transfer Company; Kaplan Trucking Company; Long Transportation Company; McLean Trucking Company; Ryder Truck Lines, Inc.; Earl C. Smith, Inc.; Strickland Transportation Company, Inc.; United Trucking Service, Inc.; and U.S. Truck Company, Inc., Consolidated Freightways Corporation, a protestant in the origianl sub 2345 proceeding, also made an appearance at the hearing.

desist order against alleged unlawful operations of REA Express, Inc. In addition, by petition filed December 1, 1975, the American Trucking Associations, Inc. seeks dismissal of the application designated as MC-66562 (Sub-No. 2314) and for cancellation of MC-66562 (Sub-No. 2308TA).

By order of April 5, 1976, these proceedings were designated for handling on a consolidated basis and certain provisions for discovery were made. By order of April 14, 1976, the Bureau of Enforcement of this Commission was directed to participate in the complainant proceedings for the purpose of developing the record. By order of July 28, 1976, the Commission prescribed special rules for the submission of evidence and referred the matter to an Administrative Law Judge for hearing. Appropriate statements were filed by the complainants and petitioners (hereinafter generally referred to as complainants), one week prior to the start of the hearing and hearing was held on a consolidated record at Washington, D.C., commencing on August 30, 1976, and extending through September 22, 1976. At the hearing, Alltrans Express, USA, Inc., was allowed to intervene in opposition to the relief requested. At the close of the hearing October 18, 1976, was set as the brief date. Also, a filing date of October 25, 1976, was established for the submission of reply briefs. By notice served October 15, 1976, the Commission announced that it would expedite the processing of these proceedings by dispensing with the Administrative Law Judge's initial decision and by issuing a report of the Commission. Briefs and reply briefs were timely filed by all parties. The record has duly been certified to the Commission by the Administrative Law Judge with the observation that: "The statements and demeanor of all witnesses testifying at the hearing did not demonstrate any instance which would subject the credibility of such witness to question."

CONTENTIONS OF THE PARTIES IN POST-HEARING BRIEFS

INITIAL BRIEFS:

Complainants maintain that the defendant has willfully and otherwise breached its obligation to render a service which is validly consistent and reasonably commensurate with the scope of its express service authority. They contend, for example, that through tariff restrictions, REA's Rexco division does not hold itself out to transport either commodities requiring special care in handling or lighter-weight shipments, both of which services are basic indicia of express service. Complainants contend that, on the other hand, Rexco actively solicits traffic which is not susceptible to transportation in van-type trailer equipment and that it provides call-on-demand and irregular-route services all of which are beyond the scope of the express service authority pursuant to which Rexco conducts its operations. Moreover, complainants allege that Rexco violates its published tariffs and governing publications by regularly performing stop-in-transit service and by its failure to issue uniform express receipts or uniform express bills of lading. Complainants and petitioners also set forth data to demonstrate that Rexco's published rates are equivalent to those of general freight carriers instead of being set at premium levels (which express service authority demands). Complainants also attribute other unlawful activities to the Rexco operations. They contend that Rexco's procedures for employing the services and equipment of owner-operators on a trip-lease basis are violative of this Commission's rules governing such transactions in Lease and Interchange of Vehicles, 49 CFR 1057.1 *et seq.*, in that the duration of the Rexco trip-lease agreements are not of sufficient (30-day minimum) duration and because of a lack of proper inspection of the motor vehicle equipment utilized pursuant to those agreements. Moreover, based on data contained in shipment manifests obtained in discovery herein, com-

plainants contend the services performed by Rexco drivers, are, in numerous instances, violative of hours-of-service rules of the Department of Transportation.

In conclusion, complainants argue that "all" outstanding temporary authorities issued to defendant, especially those in No. MC-66562 (Sub-No. 2308 TA), the so-called "hub" temporary authority, should be revoked and all corresponding permanent authority applications, especially that in No. MC-66562 (Sub-No. 2345) (Part No. 181), the so-called "hub" permanent authority application, should be dismissed because of the failure of defendants to render a continuous and adequate service with respect to the former, and to maintain active prosecution of the latter.

Generally speaking, the Bureau of Enforcement contends that the transportation service being performed by the Rexco Division is not express service and therefore Rexco is operating beyond the scope of the REA authority which is limited to the performance of transportation in express service. More specifically, the Bureau argues that in many instances shipments handled by Rexco (1) are not transported pursuant to established schedules, (2) do not move over specified or, in some instances, authorized routes, and (3) involve unnecessary interruptions, all of which is inconsistent with this Commission's description of express service. Moreover, the Bureau argues that Rexco's published tariffs exclude the carriage of smaller weight shipments and certain commodities requiring special care in handling. Furthermore, it contends that Rexco's emphasis on the solicitation of traffic which is not susceptible to transportation in van-type trailer equipment, effectively restricts the access of the shipping public to Rexco's services to an extent contrary to Rexco's duty to render express service. In conclusion, the Bureau contends that the failure of defendants to provide any but a small portion of the service authorized in REA's operating authority, for this

reason alone, results in operations which cannot be characterized as express service.

As a general proposition, defendant contends that by seeking the relief requested in this proceeding, complainants and petitioners have abused the processes of this Commission in a concerted effort to eliminate the competition of the defendant and the potential competition of the nationwide express service which intervenor Alltrans plans to provide. As another general proposition, defendants maintain that the Rexco operations are the only REA operations which are the subject of this proceeding; and that the Rexco operations must be viewed as a small part of REA service and, further, as an attempt on the part of REA's trustee in bankruptcy to protect and preserve the operating rights of the bankrupt REA Express, Inc. Defendant argues that the complainants have failed to meet their respective burdens of proving that the Rexco operations have deviated and are continuing to deviate from the express service defendant is obligated to provide. Moreover, defendant contends that Rexco's truckload service and its policy of transporting any and all commodities regardless of whether they move in ordinary van-trailer equipment are proper and that as an express carrier it is exempt from the Lease and Interchange of Vehicle rules under 49 CFR section 1057.3(b). Furthermore, defendants argue that inasmuch as compliance was made with each Commission order in the hub permanent authority application proceeding and, inasmuch as the Commission has never set a date for oral hearing in that proceeding, the hub permanent authority application cannot be dismissed for want of prosecution and the corresponding hub temporary authority cannot be cancelled. Additionally, defendants argue that because intervenor in opposition Alltrans has contracted with REA's trustee in bankruptcy, subject to Commission approval, to operate the outstanding authorities of REA and to be substituted as applicant in REA's permanent authority applications, there can be no

doubt of the bona fide intention to prosecute the permanent authority hub application. Defendants contend that should the Commission dismiss the permanent authority hub application and cancel the hub temporary authority notwithstanding the foregoing contentions, this action will deprive the shipping public of the resumption of a nationwide express service of the type historically provided by REA.

Alltrans Express U.S.A., Inc., intervenor in opposition to the involved complaints and petitions filed, on September 27, 1976, applications docketed in No. MC-F-13003 and No. MC-99388 (Sub-No. 11), relating to its planned purchase of the defendant's operating rights. It contends that cancellation of REA's hub temporary authority is wholly dependent upon the dismissal of the corresponding permanent authority hub application because of this Commission's order extending the hub temporary authority for a period pending the outcome of the corresponding permanent authority application. Furthermore, Alltrans argues that the record herein demonstrates no failure on the part of REA to prosecute said permanent authority application but rather, as Alltrans alleges, a failure on the part of this Commission to set a date for oral hearing in the permanent authority hub application proceeding which has resulted in the delay in prosecution of that application. Alltrans further contends that complainants have not demonstrated that the present operations by Rexco are violative of REA's express service authority in that the evidence adduced by complainants and petitioners in this regard consists of testimony of witnesses who were formerly employed by REA several years ago and who therefore are not competent to testify as to current Rexco operations. Moreover, as to Rexco's allegedly unlawful rate levels and tariff restrictions, Alltrans argues that there is no requirement for the assessment of premium rates or prohibition against the transportation of truckload shipments by motor carriers operating pursuant to expres ser-

vice authority. Furthermore, as to instances of delay or unreasonable interruptions in the services of Rexco alleged by the Bureau of Enforcement, Alltrans maintains that such instances were isolated and infrequent relative to Rexco's overall operations. In short, Alltrans contends that the record herein does not demonstrate that Rexco has been rendering a service in any significant way inconsistent with the express service authority under which REA formerly operated. Alltrans submits that it has made an agreement with defendant REA's Trustee in Bankruptcy which is subject to the approval of this Commission in a finance proceeding in No. MC-F-13003 to operate temporarily all authorities of REA under section 210(a)(b) of the Interstate Commerce Act, to prosecute all pending REA motor carrier authority applications, and to purchase all existing REA operating authority. Alltrans states that it will provide a "full-spectrum" service to the extent of the REA authorities. Consequently, it argues that substantially all of the issues in the instant proceeding will be moot should it prevail in the above-noted finance proceeding.

REPLY BRIEFS:

Complainants reply that their actions herein are directed at the alleged unlawful operations of REA through its Rexco Division and do not constitute a concerted, anticompetitive assault on the bona fide express operations conducted by REA. In this regard, complainants state that Rexco's operations are indistinguishable from, and thus directly competitive with, the services of general freight carriers which, for the most part, complainants represent. Consequently, complainants contend that their rights of action in this proceeding are valid and moreover that they are entitled to relief sought by them herein from the alleged unlawful operations of Rexco which are damaging their operations and the operations of those which they represent. Complainants contend further that contrary to any inaction on the part of the Commission as alleged by

defendants and intervenor in opposition, it is REA's express repudiation of the operational feasibility of the "hub" concept in various Commission proceedings subsequent to the filing of the hub permanent and temporary authority applications which has created the undue delay in prosecution of the hub application for permanent authority. Further, complainants argue that any such delay attributable to this Commission, under the circumstances involved, does not to any degree relieve REA of its duty under Rule 247(f) of the Commission's Special Rules of Practice [49 CFR 1100.247(f)] for timely prosecution of the hub application. Thus, complainant contends that the hub application for permanent authority must be dismissed and the corresponding hub temporary authority must be cancelled. Finally, complainants contend that a potential substitution of Alltrans as applicant in the hub application for permanent authority and as operator under the corresponding hub temporary authority should not be allowed to prevent dismissal of the former or cancellation or revocation of the latter, owing to the fact that REA has admitted to the unworkable nature of the hub concept relative to its historic nationwide express service and because the stated intentions of Alltrans to institute a "full-spectrum" express service pursuant to the hub application cannot neutralize these admissions as to the lack of operational feasibility of the hub application service proposal.

The Bureau replies that, contrary to assertions by the defendant, the range of commodities transported in the service performed by Rexco is inconsistent with express service in that Rexco provides transportation for any commodity which may "conceivably" be carried in van-type trailer equipment rather than those commodities which could "safely" be carried in such equipment. Otherwise, it reasserts the contentions made in its initial post-hearing brief.

Defendant replies that Rexco's operations reflect an attempt by REA to offer service under its operating authorities to the extent possible, albeit to a small extent relative to the past nationwide REA operations, within the context of REA's bankruptcy. They contend further that because Alltrans is seeking to revitalize REA's nationwide general express services, for this Commission to cancel the operating rights of REA and to dismiss the REA applications for permanent authority as complainants request on the basis of the operations of REA's Rexco Division, would result in a penalty far outstripping the wrongs, if there be any, committed by REA through its Rexco Division and would work to the severe detriment of the shipping public by depriving it of the nationwide express service to be provided by Alltrans.

Alltrans replies that complainants request for dismissal of all temporary authorities issued to REA, based on the alleged willful and wanton violations by defendants of their express service obligations is beyond the legitimate scope of this proceeding. It asserts that such action on the part of this Commission, based on the record in this proceeding, would constitute a breach of due process. Nevertheless, based on what it purports to be the abstract nature of the term "express service" and the overall record herein, Alltrans contends that complainants have not maintained their burden of proving the existence, much less the willfulness of such violations on the part of defendants.

PRELIMINARY MATTERS

On brief, complainants renew their objection to the Administrative Law Judge's ruling that a number of complainant carriers would not be allowed to testify because their testimony would be cumulative and because prepared statements giving the exact nature of their testimony had been submitted prior to the start of the hearing. Rule 76 of

the Commission's *General Rules of Practice*, 49 CFR 1100.76 notes the duty of the hearing officer to limit the number of witnesses whose testimony may be merely cumulative. The ruling that the noted material would be cumulative was made after testimony and cross-examination of several complainant carriers had been allowed and, under these circumstances, the ruling was a proper exercise of the Administrative Law Judge's function. See *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, (1947).

Complainants also object to the receipt, as "facts", of several exhibits presented by the defendant. These exhibits, identified by defendant as "Admissions and/or Stipulations of Fact" are quotations of findings regarding REA that were made in prior, identified decisions of this Commission. They are not excerpts taken only from the records of those proceedings and they do not relate to matters (such as proof of public need), which possibly could be refuted by cross-examination. The quoted findings pertain to the historical functions of REA as related by this Commission and we conclude that this properly may be received and considered in this proceeding. Compare *Coastal Tank Lines, Inc., Ext. — W.Va.*, 108 M.C.C. 190, at 194, and cases cited therein. In a similar vein, we also will take notice of our findings in other cases cited below as well as statements of the Commission made in its annual reports to Congress. See *Santa Fe Trail Transp. Co. Ext. — Colo. & Kans. Points*, 111 M.C.C. 224, at 227. Accordingly, we consider that the so-called "Admissions" were properly received.

Although a number of other objections were made during the course of the hearing by several of the parties, these objections have not been pressed in brief and will be considered as waived. See Rule 87 of our General Rules of Practice.

Intervenor Alltrans has filed a motion to strike complainants' brief or, alternatively, certain portions of that brief. Complainants have filed a reply. The intervenor's motion will be, and it is hereby denied. Clearly, complainants' overall brief is in conformance with our General Rules of Practice. Complainants' comments pertaining to a request that "all" of REA's Temporary Authority be revoked and their comments relative to leasing regulations and REA's fitness may be considered to be material, especially to the Commission's awareness of factors related to the embraced petition proceedings and our duty to know the status of carriers we are required to regulate. The intervenor also asks that testimony of record relative to safety be stricken. The latter request relates to prior objections made at the hearing and not renewed by intervenor on its brief and, as noted above, such request must be considered as having been waived.

HISTORY AND BACKGROUND

In order properly to understand and evaluate the matters involved herein, it is necessary to be aware of the nature of REA's authority, the more recent history of its pre-bankrupt operation, and its post-bankruptcy activities.

Its earlier history has been concisely summarized in our report in *REA Express, Inc., Application For ETA*, 117 M.C.C. 80 (1971) at pages 81 through 86, a decision which denied a preliminary attempt by REA to restructure further its operations into an irregular route express service. This report also contains a concise description of the so-called "Hub System" which is the subject of the embraced petition proceedings herein, the pending permanent application filed in 1968, and the temporary authority (granted in June of 1968), to operate under the "Hub System". As we stated in that report at pages 84 and 86:

The "Hub" system sought by REA essentially consists of 24 major points for the dispatch and receipt of small shipment traffic which, according to REA, generally follow the production areas outlined by the Bureau of the Census. Each "Hub" is connected with each of the others by a motor or rail line-haul route, or a combination of both. Each of the "Hubs" assertedly would serve an area containing satellite points to be served in all-motor operations. To implement this system, REA filed the largest single application in the history of this Commission, which application outlined each route and segment proposed to be utilized (without any rail-haul restrictions) in the performance of the "Hub" service.

* * *

Having operated in the Hub configuration for approximately 3 years, REA's new management has recently proposed another complete restructuring of the carrier's operations. To this end, it initially sought temporary authority, based upon the same type of allegations used to support the "Hub" system, to perform nationwide irregular-route service in the transportation of general commodities, moving in express service. That application was denied by order of this Commission served August 9, 1971, for the reasons that (1) REA had failed to demonstrate an immediate and urgent need for the institution of the proposed service (2) "irregular route" service would be inconsistent with express service, (3) REA had failed to establish that irregular-route service would be either operationally or economically feasible, and (4) REA had failed to establish that the requested authority would solve any of the carrier's asserted operational problems.

> Clearly, this Commission has been sympathetic to the various requests of REA's management concerning its operational and rate structuring, in the belief that the carrier's management had presented the most effective, and perhaps the only pattern of service which would keep REA viable. Despite permitting REA such wide latitude, REA is still in perilous financial straits, and, by its own admission, is conducting an uneconomical, loss-producing operation.

We went on to state at pages 88 and 89 that:

> . . . The basic indicia of express service have been set forth in previous Commission reports.[3] One index of express service is that the carrier must perform actual operations between all authorized points upon *firmly established schedules* allowing minimum practicable highway transit time and providing fixed delivery times which are available to actual and potential shippers at authorized origins which in practice are not changed, except after substantial notice to the general public. In essence, this means that express service, whatever else it may be, must be performed as an expedited, regular-route service. Such service is operationally inconsistent with irregular-route service which, in the usual concept, envisions a "call-on-demand," unscheduled operation. This same issue arose in the *Nashua* case and, beginning at page 322, it was discussed at some length. Thus, REA has been well advised that its basic proposal contains inconsistent terms and yet we still have not been presented with a rationalization for the inconsistency or any reason

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[3] *Transportation Activities of Arrowhead Freight Lines*, 63 M.C.C. 573, 581 (1955).

> for this Commission to modify its previous standard of express service.
>
> If REA is to forego completely its regular-route operations, it well may be that it will evolve into no more than an ordinary motor common carrier of small shipments, and cease to exist as an express company. Should this be the case, REA, as a motor common carrier, could not avail itself of express company terminal areas, but would be limited to those permitted carriers of its new status. The effect of this upon REA's operations cannot be determined upon the record before us.

Several portions of prior decisions, cited in the *ETA* case, are of special significance. In *Railway Express Agency, Inc., Extension- Nashua, N.H.*, 91 M.C.C. 311, 324 (1962), we stated:

> . . . this Commission has always intended the term "express service" to mean generally the expedited handling of small-parcel traffic which common carriers of ordinary freight do not desire usually or are not able to perform. It is a service superior to that rendered as a rule by common carriers of general freight, and thus requires the payment of premium charges.
>
> From this view it follows that "express service" is not susceptible of precise definition because it is, by its very nature, a service whose attributes of expediency, premium rates, and special handling of freight must be judged in comparison with the services and rates provided and assessed usually by common carriers of ordinary freight.

And, in the earlier report in *Transportation Activities of Arrowhead Freight Lines*, 63 M.C.C. 573, at 581 (1955), the Commission discussed the basic criteria of a bona fide express service as follows:

Summary.— Succinctly stated the rendition of a bona-fide express service by property carriers with authority to transport general commodities requires such carriers (1) to provide a bona fide holding out together with the ability to transport any commodity which may be safely transported in ordinary van-type equipment, including those requiring a maximum degree of care or security or both, (2) to provide such care or security or both as the inherent characteristics of the commodities making up the shipment which are accepted may require, (3) to provide equally expeditious transportation and careful handling for all accepted shipments, regardless of their volume, special demands, or value, from the point of pickup to the point of delivery, (4) to perform actual operations between all authorized points upon firmly established schedules allowing minimum practicable highway transit time and providing fixed delivery times which are available to actual and potential shippers at authorized origins and which in practice are not changed except after substantial notice to the general public, and (5) to use relatively simple billing, rate structures, and rate publications whereby the rates and charges for the services offered and performed may easily be determined with a minimum of delay.

Since the filing of the "Hub System" application in 1968, and the attendant approval of temporary authority, the Commission consistently has been aware of and concerned with the status and operations of REA.

We believe that a recognition of such awareness should be reflected in this decision and, in order to do so, we believe it appropriate to take official notice of statements of the Commission made in our 86th (1972) through 89th

(1975) *Annual Report of the Interstate Commerce Commission*, and to quote the following excerpts from these reports:

86th Report (1972) at pages 53 and 54:

> The relative importance of REA Express, Inc. (REA), as a major common carrier of intercity small shipments has declined continually since World War II. For example, in 1946 REA handled 235 million surface shipments, but by 1971 its traffic had declined 94 percent. As a result of this precipitous descent, REA's surface shipments account for less than 1 percent of the tonnage of estimated total regulated intercity small shipment traffic. Service contractions and continued rate increases appear to be the major contributors to this steady decline in business.
>
> Air express traffic has become an increasingly significant part of REA's service, accounting for about one-third of its total business. Even so, its air express tonnage is less than in 1965.
>
> Notwithstanding some improvements in the general economy in fiscal 1972, indications are that REA's general decline has not been arrested. Barring a dramatic upturn in business, REA's outlook for the immediate future is rather bleak.
>
> Although REA's loss in traffic is apparently being absorbed by major regulated competitors (motor carriers, bus express, United Parcel Service, small package carriers, and to some extent, by private shipper associations) total elimination of REA's service probably would cause inconvenience to shippers in the distribution of such items as perishables, live animals and birds, and other special items.

This Commission is extremely concerned with the future prospects of REA Express, Inc., the Nation's largest express carrier. In No. MC-66562, *REA Express, Inc., Application for Emergency Temporary Authority*, 117 M.C.C. 80, however, we were unable to approve REA's six-volume application for 30 days' emergency irregular-route temporary authority, because REA failed to set forth (1) any reasonable manner in which it could or would perform virtually nationwide irregular-route service, (2) the manner in which "express" service could be performed on a nonscheduled basis or over anything but regular routes, and (3) the nature of the purported "new financing" which it expected to become available as a result of such a grant of temporary authority.

87th Report (1973) at page 46:

Once one of the nation's premier intercity common carriers of parcel-size shipments, REA Express, Inc. (REA) has fallen upon difficult times as the volume of freight it has carried — especially over surface routes — has continued to decline. In 1965, REA handled 1.8 million tons of surface shipments. By 1972, its volume had declined over 68 percent. Managerial disruptions, changing national distribution patterns, service contractions, labor disputes, increased competition, and severe financial difficulties appear to be the principal contributors to the decline in REA's business.

Even air express tonnage, although it increased by approximately 5.4 percent in calendar 1972 over 1971, is still less than that recorded in 1965. While air express tonnage rose, the number of air

express shipments declined by 4.3 percent during the 1971-72 period.

As noted in our 86th Annual Report, the long term outlook for REA is not auspicious.

88th Report (1974) at pages 54 and 55:

In regard to surface transportation authority, REA retains its temporary authority, issued in 1968 by this Commission pursuant to section 210a(a) of the Interstate Commerce Act, to operate its "Hub System." The system essentially consists of 24 major points for dispatch and receipt of small shipment traffic. Each hub is connected with the others by a motor or rail route, or combination of both. Each hub assertedly is designed for an area containing satellite points to be served in all-motor operations. The concept proved to be inefficient, necessitating considerable exceptions to the basic operating plans.

Although the system today bears little resemblance to the original concept, the company's operations are based almost entirely upon the temporary authority in the hub application.

Surface express traffic has continued to decline but at a more moderate rate than that experienced by the company in the 1960's. REA surface traffic dropped sharply from 57.7 million shipments in calendar 1965 to 19.3 million in calendar 1970. Correspondingly during the same period, revenues declined from $350 to 267.2 million. However, surface traffic has stabilized somewhat during the past few years. Surface traffic volume in calendar 1971 amounted to 14.5 million shipments, 10.8 million in calendar 1972, and 10.4 million in 1973. Revenues dropped from

$172.7 million in calendar 1971 to $148.6 million in calendar 1972 but recovered $161.2 million in 1973. Preliminary estimates indicate that this trend will hold for fiscal 1974.

Preliminary traffic and revenue estimates indicate REA's financial position has improved slightly for fiscal 1974, primarily attributable to a 10-percent rate increase on surface transportation effective March 14, 1974. Whether REA has the capability to continue as a viable transportation entity in light of the CAB order remains to be seen.

89th Report (1975) at pages 48 and 49:

REA Express, Inc. (REA) continued to experience operating and financial difficulties, forcing the company on Feb. 18, 1975, to file for reorganization under Chapter XI of the Bankruptcy Act, Chaper XI allows REA to continue operations while developing workable plans to improve its financial posture thus enabling it to pay off its creditors, principally the airlines, railroads, and banks.

While all debts or claims incurred prior to February 18, 1975, are temporarily frozen, the Commission's insurance requirements protect the shipping public for loss and damage claims. All such claimants will receive payment in full, up to our $2,500 per claim minimum requirements, by the insurance company which made our statutory security filing. Arrangements have been completed for all cargo claimants to be advised of this protection, furnished the name of the insurance company, and how to file their claims.

Such loss and damage claims are being processed and paid with the total payment expected to be

approximately $3,000,000. Without this protection, cargo claimants would be required to award (sic) [await] the ultimate resolution of the reorganization proceeding and whatever percentage of payment is decreed.

The pressure of the December 1974 Civil Aeronautics Board ruling which threatened the existence of REA's air express operation, accounting for 62 percent of the company's revenues in 1974, was lessened somewhat by a Federal court ruling which stayed the effectiveness of the CAB order and subsequently remanded the decision to the CAB for further action.

Nevertheless, the CAB views on the need for the type of air express services provided by REA, which led to the Board's decision to terminate domestic air express, still continues to be of prime concern to the company. In April 1974, the Board disapproved an air express agreement negotiated between REA and 22 airlines. Although subject to review by a Federal appeals court, such CAB actions will no doubt be a major determinant in the company's reorganization plans and operational programs.

The CAB has ordered the scheduled airlines to develop operational programs to provide priority air service to replace their agreement with REA. A statistical profile of REA's traffic shows a marked decrease in the company's air express traffic and revenues. The air volume decreased from 98 thousand tons in 1973 to 86.2 thousand tons in 1974; the number of shipments declined from 6.54 million in 1973 to 4.81 million in 1974; and revenues dropped from $107.4 to $103.2 million for the same period.

Air express volume was down considerably in the first quarter 1974, which probably reflects the uncertainty on the part of the shipping public as to the ability of the company to retain its priority status with the airlines in domestic air express operations.

While its surface traffic volume declined from 713 thousand tons in 1973 to 676.6 thousand tons in 1974, and the number of shipments dropped from 9.99 million to 8.96 million for the period, revenues from its surface traffic rose from $154.5 million in 1973 to $165.8 million in 1974.

Essentially, the company's financial problem is a shortage of cash, although it did manage an operating profit of about $3 million in 1974, compared to a deficit of approximately $8.5 million in 1973. Its present critical cash position has been attributed by company officials to the general state of the economy, the inability to obtain bank credit and Federal government aid, and the recession in the auto and textile industries — two of REA's biggest customers.

The Commission's principal action which may affect REA was taken in a report and order served December 20, 1974, *United Parcel Service, Inc., Extension — 48 States,* 120 M.C.C. 747. By this order, the Commission's Division 1 granted an extension of the Company's common carrier authority to bring UPS service to all of the 48 contiguous States.

In an effort to survive, REA has realigned its rate structure to be more competitive with forwarder service. REA's planned marketing strategy has been to concentrate on expanding its air express

> operations, initiating a reorganization plan to tighten control over its trucking operation, and consolidating its surface operations.

During the later years when REA was seeking to restructure its operations for the sake of survival, the Commission, in *Chemicals In Aggregate Shipments — Midland, Mich., To East,* 335 I.C.C. 20, (1969), approved REA's reduced *truckload* commodity rates on chemicals where the service otherwise fully satisfied the criteria of *Arrowhead, supra.* REA also is shown to have participated in certain truckload movements of cosmetics between Chicago, Ill., and Atlanta, Ga., and of bakery items from Pittsburgh to eastern locations. Certain other truckload rates were published by REA, however, it appears that none of these were based upon a mileage scale with general applicability. It also is noted that in another temporary authority application in Sub-No. 2337TA*, a pleading by REA dated June 11, 1971, specifically advised the Commission as follows:

> [F]or REA to pursue to conclusion the permanent application in the Hub case would do the Commission, the public and REA a considerable disservice. For experience demonstrates that the Hub authority precludes REA from providing to the public a modern, efficient and economical express service. The present and future of shippers and REA depends on replacing the Hub and other bits and pieces of motor operating authority it holds with the authority sought herein. Rather than imposing a burden on the Commission, REA's present application will avoid the necessity of a hearing on the Hub application — which

*In Docket No. 66562 (Sub-No. 2337 TA) dated March 1, 1971, REA applied for authority "to operate motor vehicles transporting commodities generally moving in express service between all points in the United States over non-radial irregular routes."

> events have shown cannot do the job — as well as the numerous pending atomized bits and pieces of regular route authority. For REA will dismiss the Hub proceeding and all other pending applications for motor operating authority upon final approval of the grant of the authority sought.

The Rexco Division of REA[4] was established in the Spring of 1975, and commenced operations in August of 1975. REA which had been operating since February, 1975, as a Debtor-in-Possession under Chapter XI of the Bankruptcy Act, was by Order of the Court entered November 6, 1975, adjudicated a bankrupt and ordered liquidated. Thereafter, on November 7, 1975, REA filed "Embargo Notice No. 1" placing an embargo against all traffic tendered to REA Express, Inc. after 12:01, Friday, November 7, 1975. By virtue of a tariff issued June 10, 1975, effective June 15, 1975, I.C.C. 153, Commodity Tariff 85, the Rexco Division of REA remained in operation as a result of an amendment to Embargo Notice No. 1 issued November 10, 1975. All other REA operations, except those of the Rexco Division, ceased operation in November, 1975, and since that time all assets have been liquidated except for REA's operating authority. By agreement dated July 27, 1976, and approved by the Bankruptcy Court for the Southern District of New York, by Order dated July 27, 1976, Intervenor contracted with the Trustee, subject to approval of this Commission, to purchase and operate the certificates and temporary authorities of REA.

At the hearing, several former and one current Rexco agents described Rexco's method of operation. Although

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[4]REXCO, Inc., named in the lead complaint, was determined to be a separate entity not involved in the matters under consideration herein and by stipulation, it was agreed that it should be removed as a party defendant.

the general manager of the Rexco Division was present throughout much of the hearing, he did not testify. Also, the Trustee in Bankruptcy was not called to offer any testimony or explanation regarding the Rexco operation or his position regarding other matters.

Rexco's principal employee is its general manager. He operates from the Philadelphia area with a small staff that is principally engaged in billing shipments and paying agents and owner-operators. His principal functions have been in solicitation of traffic and in arranging for agents to solicit traffic and to obtain owner-operators to perform actual pickup, transportation, and delivery. No equipment is owned and none is operated under long term lease. No drivers, mechanics, safety men, tariff experts or supervisors are employed. The agents are located at numerous places across the country.

The agents were generally instructed that they would solicit and handle traffic originating or terminating basically anywhere east of a line drawn generally north-south through the Rocky Mountain Region of the country in the vicinity of Denver and Albuquerque, plus certain locations west thereof. The agents were paid 7 percent of the revenues. Seventy-five percent of the revenues went to the supplier of the equipment and the driver. No other significant instructions were given regarding REA's actual authority except that Philadelphia could be called if there were problems. Agents were told not to solicit less than truckload traffic and the traffic actually handled was basically truckload or, at least, utilized the entire capacity of the vehicle.

The Rexco tariff basically reflects a scale of rates with at least a minimum 16,000 pound weight and the charge in most instances was within a few dollars of what the charge would be for a 40,000 pound shipment. The tariff specifically embargoed a wide range of commodities in-

cluding live animals, perishable products, bullion, coin and other items of unusual value formerly handled by REA. The cost of transportation to a shipper (especially on moves of over 300 miles, which the agents were to emphasize), would usually be significantly less under REA's Rexco tariff than comparable moves by irregular route and regular route motor common carriers such as complainants. Agents used this rate difference as a primary solicitation tool.

Since the institution of the Rexco operations, several of the complainant motor common carriers have experienced specific diversion of truckload traffic to Rexco. These shipments have been of truckload amounts and such commodities as auto parts, iron and steel articles, building materials, aluminum, chemicals, and paper. A comparison of the Rexco rates and those of one of the complainants shows that on a 40,000 pound shipment of auto parts from Detroit, Mich., to Chicago, Ill., the shipper would pay complainant $412 and Rexco $220. An owner-operator's share would approximate $1.16 a mile in the first instance and $.62 a mile under a trip lease with Rexco. A detailed examination of Rexco's records by the Bureau of Operations of this Commission showed among other things, that during the period March 1 through 15, 1976, Rexco transported 674 truckload shipments between various points in the United States. Rexco's records reflect that between August, 1975, and June, 1976, it handled approximately 6,000 truckload shipments.

Drivers and equipment generally were obtained at nearby truck stops and trip leases usually were arranged so that an owner-operator could avoid a possible empty back haul, although on some occasions round-trip, back-to-back trip leases were arranged. Some agents had difficulty meeting requests for service because some drivers did not want to trip lease to REXCO as they felt that their overall payment

was low or they had had difficulty securing timely payment from Rexco in the past.

The service performed for shippers was direct from consignor to consignee (on rare occasions stop-off privileges were utilized. Ordinary van equipment was often used, however, flatbed units were frequently used for transporting a significant proportion of Rexco's traffic (especially iron and steel articles and heavy machinery). Because of lack of adequate equipment features such as tie downs on ordinary vans, it appears that items such as steel coils and heavy machinery could not have been transported safely in ordinary van equipment.

Rexco has no central dispatch system and once a driver left the origin point he basically was out of Rexco's control. Generally he would call Rexco in Philadelphia only if he wanted to in case of trouble. Inspections of vehicles generally was made by the agents or their associates. Rexco's home office control was exercised only by insistence on completed paperwork being turned in before payment would be made. No check was made as to the accuracy of some paperwork item such as drivers' logs and inspection forms. On occasion, Rexco's records show that proper inspection of vehicles was not made and drivers violated the hours of service regulations of the Department of Transportation.

Except for checking with Philadelphia on accepting shipments to move west of Denver, no attempt was made by agents to find out if the origin and destination points could be served or what routing instructions should be given. Basically, instructions on shipping documents were generalized as "Rexco Direct" or other similar wording. Drivers were not instructed to travel specific routes or to go through specific points and it appears they generally went over the nearest direct highways in the Interstate system or over routes of their own choosing. These routes sometimes

went to the driver's home town where the drivers went off duty for hours or days even though delivery could safely have been made within a much more expeditious time frame. A number of Rexco movements crossed Pennsylvania, apparently on Interstate Highway 80, a route not authorized in REA's authority. Other examples of traversal of routes not authorized to REA were shown to have occurred in Texas and Oregon. Also, points were served that are not listed in REA's terminal area publication or Waybill Guide (upon which its tariffs depend), including Fenwick, W. Va., Stephens City, Va., Elverson and Trumbauersville, Pa., Huguenot, N.Y., New London, Tex., and Huntington, Utah.

Except for a few instances where back-to-back trip leases reflected several movements on a regular basis, shipments were handled when a request for service was made and when an owner-operator became available. A delivery commitment was not made.

Rexco has not attempted to comply with the Commission's leasing regulations based upon its contention that section 1057.3 of the applicable regulations (49 CFR 1057.3(b)) provides they shall not apply "to equipment utilized wholly or in part in the transportation of railway express traffic, . . ."

It also appears that those in charge of the Rexco operation have little knowledge of REA's underlying tariff and related publications other than the basic Commodity Tariff 85 which became effective June 15, 1975 and Rexco has not attempted to conform with various provisions relating to requirements that it not provide free pickup and delivery beyond certain limits, that no partial unloading is permitted where charges are collect, and that it issue a Uniform Express Receipt or Uniform Express Bill of Lading.

DISCUSSION AND CONCLUSIONS

For approximately a year now, there has been no traditional small package express service by REA Express, Inc. REA is gone except for (1) operations conducted by the so-called Rexco Division under REA's authority and (2) REA's one unliquidated asset, its certificated operating authority. A decision on the issues described in these proceedings cannot require a trying of any issues that relate to the apparent proposal of Alltrans Express U.S.A., Inc., to attempt to provide a "full spectrum, nationwide express service" based upon the operating rights that it plans to purchase. Accordingly, our discussion and conclusions herein will be confined to the direct issues covered below, namely: (1) are the operations conducted by REA's Rexco Division a valid exercise of REA's authority which is basically limited to movements in "express service"? (2) should the unprosecuted application of a bankrupt and liquidated carrier, on file for 8 years, be dismissed? and (3) should the temporary authority held by a bankrupt and liquidated carrier be revoked?

I

Turning first to the complaint proceedings, we conclude that the Rexco Division operations cannot be found to be consistent with the basic limitation applicable to most of REA's authority that such movements be "in express service."

Although we have said that "express service" is not susceptible of precise definition, we repeatedly have set forth guidelines that have established the basic indicia of that term. Here, we need not consider whether an operating express company, holding authority limited by these terms, could never stray outside the general definition set forth in the *ETA*, *Nashua*, and *Arrowhead* cases, *supra*. We do not deny that there could be situations (such as the handling of

consolidated truckloads), where a service would not meet one of the general criteria of express service but would at least satisfy several of these requirements. Also, we need not consider if an operating express company, whose overall transportation activities predominantly satisfy the definitions of express service, can conduct operations not within the strict concept of express service but nevertheless incidental to express service. Compare the decision in *Chemicals in Aggregate Shipments, supra.* Here, since at least November of 1975, the Rexco operation has been conducted in such a manner that it completely lacks even a minimal attempt to conform with the well established indicia of express service. The operation conducted by Rexco bears no relationship to REA's traditional small parcel service other than the incidental use of the phrase "a Division of REA Express, Inc.," and the sanction of the Trustee in Bankruptcy to use REA's operating rights in exchange for certain revenues.

In effect, the Trustee has allowed the establishment and perpetuation of an REA franchise system that amounts to nothing more than an unauthorized leasing of operating rights to various commission agents who desire to use the REA name, authority, and tariff. The Rexco Division itself is nothing more than an agent and sales solicitation service with an attendant billing service.

Rexco's general manager does not direct, control, or bear responsibility for REA's operations. As noted, the defendant herein failed to call this general manager as a witness, the one person who would appear to be most knowledgeable about the Rexco activities. Thus, there is nothing on this record to indicate that there is anyone capable of knowledgeable and responsible management of the purported motor carrier operations under REA's authority. To the contrary, the investigation of the complainants and the Bureau and the testimony of past and present Rexco agents, show the following: no one in the

management of Rexco is familiar with the overall scope or limitation of REA's operating authority; no attempt is made to see that service is performed to and from authorized points (with the exception of some points west of Denver); no attempt is made to see that drivers traverse authorized regular routes or to instruct them to use such routes; no responsibility is taken for control of drivers or shipments after pickup; no attempt is made to insure the expeditious movement of any shipment; no attempt, other than completion of paperwork, is made to insure the required inspection of trip-lease vehicles, the proper filling out of drivers' logs, or the attendant proper observation of the Department of Transportation hours of service limitations; no attempt is made to insure that only commodities covered by its tariffs are transported; no attempt is made to transport less-than-truckload or small package shipments; no attempt is made to use only ordinary van equipment; no attempt is made to see that proper express receipts or other tariff requirements are followed; and no attempt is made to be knowledgeable of leasing or other regulations that would tend to be applicable to its method of operation.

The record does show that the Rexco operations are not performed pursuant to any established schedule (a few movements have occurred on a regular basis); the operations are not conducted over regular routes; they do not move through or between terminals; they do not move at premium rates; they do not move in an expeditious manner; they often do not move in ordinary van equipment; they exclude the transportation of small parcels and less-than-truckoad volume; they exclude the transportation of unusual type commodities; and they do not handle shipments requiring special care. In short, the record shows that Rexco operates, in effect, simply as a broker of irregular-route transportation of truckload quantities and, under these circumstances, no conclusion can be sustained

other than that Rexco's operations are and have been beyond the scope of REA's underlying authority. The assertation by intervenor Alltrans and the defendant to the effect that REA's past operations have been those of a "full-spectrum" carrier amounts to little more than "sloganism" and is, to put it politely, inconsistent with the factual history of REA's operations. Although we recognize the duties of a trustee to preserve the asset of a bankrupt entity, it must be made perfectly clear that that duty does not grant a license to circumvent the regulatory requirements of this Commission. Here, the Trustee has chosen to pursue an extreme approach assertedly to preserve the "authority" asset of the bankrupt and, moreover, has actually attempted to expand upon that authority, without approval from this Commission (and without due process in respect to existing motor carriers), by moving the company into a substantially different area of transportation than that which it holds authority for. In his disregard of the limitations of REA's authority, he may have jeopardized, rather than preserved, that asset. Here, we must conclude that the past Rexco Division operations have been in the nature of willful violations that cannot be considered to be of the type that could be evaluated as "good faith" operations, "under color of right" and thus given affirmative weight in the future purchase proceeding or any related matter.

The Rexco operations have been totally illegal and all of its transportation services in non-express movements through the use of commission agents and trip-leased equipment must end immediately. Accordingly, an appropriate cease and desist order will be entered.

II

The application in the so-called "Hub System" proceeding must be dismissed. It has been on our docket

for 8 years and since the pre-hearing conference held on January 12, 1970, no further action has been requested by the applicant despite an initial assertion at prehearing that it would be ready to present its operating evidence in April of 1970. Rule 247(b) of our General Rules of Practice requires that an applicant who does not intend timely to prosecute its application shall promptly request dismissal thereof. This, we believe, places some affirmative duty on an applicant to prosecute or seek dismissal. Applicant has done neither. It apparently did not seek dismissal because to do so would require the termination of its corresponding temporary authority in Sub-No. 2308 TA. It attempted to make a go of the "Hub System" approach between June, 1968, and mid 1971, but, in effect, it repudiated that approach, and specifically expressed its intention to dismiss the Hub proceeding if it could be granted temporary authority to try another approach (See the *ETA* decision, *supra*, and the pleading in the Sub-No. 2337 TA noted above). Authority to try other approaches was denied. REA tried to survive while attempting to operate under the "Hub System", but did not succeed.

Clearly, REA would have failed much sooner had it not been for the forbearance of this Commission (and the motor carrier parties to the application proceeding), in giving REA every possible leeway and not forcing it to go immediately to hearing on matters it was not in a position to prove.

The Commission must not passively burden the administrative process by failing to recognize factors concerning the probability that a bankrupt *and* liquidated carrier will not and cannot prosecute its outstanding applications. There is no rationale for failing to dismiss pending applications under such circumstances, unless there is some positive showing that can persuade us otherwise. This is especially true where the concept of the application in-

volves unique factors and considerations and where it is shown that the proposed operation is, in all probability, not feasible and there is little probability that the application would or could be successfully prosecuted.

We conclude that no reasons are shown to exist at this point in time to allow the continued pendency of the unprosecuted REA "Hub System" permanent application, that dismissal of this application will not be inconsistent with the public interest, the public convenience and necessity, or the National Transportation Policy and, accordingly, we will order dismissal of that application.

III

The temporary authority currently outstanding in Sub-No. 2308 TA must be revoked inasmuch as the continuation of temporary authority is conditioned upon the pendency of a corresponding permanent authority application (49 CFR 1101), and, we have concluded herein to dismiss that corresponding application.

Moreover, even if the corresponding "Hub" application were not dismissed, ample cause otherwise exists for the prompt revocation of the Sub-No. 2308 TA temporary authority. We may revoke temporary authority at any time under the provisions of Section 210a(a) of the Interstate Commerce Act and 49 CFR 1101.4 which states that:

> "nothing in this part shall be construed as preventing the Commission from terminating at any time, in accordance with law, any temporary authority or approval, or any extension thereof under section 558 of the Administrative Procedure Act (5 U.S.C. 558)".

Accordingly, if the Commission finds good cause, it may revoke an outstanding temporary authority as long as its

decision to do so is not arbitrary, capricious, outside of Commission discretion, or otherwise not in accordance with established principles. Here, the parties have had ample opportunity to make their views known to the Commission and, in consideration of these views and the record before us, we conclude that such good cause exists in this proceeding for the following reasons.

First, we observe that the fitness and ability of a carrier to conduct operations under temporary authority always is a matter of special concern. We believe the record herein shows that REA has absolutely no operational capability to perform any express service under the scope of the involved "Hub System" temporary authority. Moreover, the performance, under the apparent approval and direction of the Trustee in bankruptcy of the improper operations discussed above, shows that REA, as it now exists, is not fit to conduct proper and safe operations. Next, we again note that the feasibility of any proper operations under the "Hub System" have been shown to be impractical. Finally, we conclude that the use of the "Hub System" authority by the Rexco Division has caused a significant diversion of traffic (approximately 6,000 shipments up to May, 1976), and revenue from the Nation's regulated motor carrier industry (traffic that has had nothing to do with REA's traditional small parcel express service), and that to continue to allow such diversions would be inconsistent with the Commission's duty to promote and foster sound economic conditions in transportation under the National Transportation Policy.

Under these circumstances, we find no saving reason to perpetuate the "Hub System" temporary authority and we find it necessary and proper at this time to revoke this authority. And, for the reasons noted above, we will undertake a review of all other outstanding temporary authorities granted to REA but not directly before us in

these proceedings with a veiw toward their necessary revocation.

The defendant REA and intervenor Alltrans make it clear that, pursuant to a contract between them, Alltrans would seek to revitalize operations which REA voluntarily shutdown well over a year ago. Certain of these operations have not been performed for a number of years. We take particular note of the fact that the shipping public has been without this service by REA and that other carriers have expanded to fill the void created as REA's service eroded over the years. It is in that light that we look upon the contention of REA and Alltrans that dismissal of REA's pending applications for permanent authority and cancellation of its corresponding applications for temporary authority would amount to a severe detriment to the shipping public supposedly by depriving it of a nationwide express service to be provided by Alltrans. It was an unfortunate circumstance that an important provider of parcel service has had a strike in a number of eastern States at a time when the transportation system normally is called upon to handle an extraordinary amount of holiday-season shipments. Nevertheless, whatever immediate need arose out of that strike cannot be a major consideration in determining the long-range issues in these proceedings or in the Alltrans' proposal to embark upon a new nationwide general express service. There is available within the law today — through Section 210a(a) of the Act — a means by which *any* immediate and urgent need for transportation service can be satisfied by willing carriers. Further if there is, in fact, a need for a nationwide general express service to handle, by motor carrier, general commodities over regular routes, and such a service can be distinguished from that now being provided by regular-route carriers of general commodities, the law provides a way through Sections 210a(a) and 207 (and certain other provisions) of the Act by which carriers may seek appropriate authority. The present

statutory plan provides the means by which such a service can be instituted on an emergency basis if an urgent need can be shown.

IV

Under all these circumstances, it is concluded that the complainants have satisfied their initial burden to establish a prima facie case, that the defendant has been afforded appropriate due process, and that complainants have carried their ultimate burden of persuasion. Compare *Natl. M. Fit. Traffic Assn. v. Columbia Shippers,* 105 M.C.C. 846 at 850.

Lastly, it is also concluded that no significant factors are shown on this record to indicate that either a grant or a denial of the relief sought herein would have any significant effect upon the quality of the human environment or upon the consumption of energy resources.

FINDINGS

In Nos. MC-C-8862, MC-C-8864, MC-C-8867, and MC-C-8874, we find that defendant REA Express, Inc., bankrupt, through C. Orvis Sowerwine, Trustee in Bankruptcy, of New York, N.Y., is and has been engaged in the performance of motor common carrier service which fall outside the definition of express service and in services otherwise beyond the scope of its specifically limited authorities as detailed above; and that an order should be entered requiring defendant to cease and desist forthwith and thereafter to refrain and abstain from all operations of the character found in this report to be unlawful, unless and until appropriate authority therefor is obtained.

In No. MC-66562 (Sub-No. 2345) (Part No. 181), we find that applicant REA Express, Inc., has failed to prosecute

its application in a timely manner; that applicant is not shown to be capable of prosecuting the application; that attempted prosecution of the application would not appear likely to result in a feasible operation consistent with the public interest and the national transportation policy or required by the public convenience and necessity such that any appropriate authority would be issued as a result of such prosecution; and that an order should be entered dismissing the application.

In No. MC-66562 (Sub-No. 2308 TA), we find that good cause has been shown for the termination of the involved temporary authority, and that an order should be entered revoking said authority.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

COMMISSIONER O'NEAL concurred in the result.

COMMISSIONER CORBER did not participate.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 17th day of November, 1976.

No. MC-C-8862

BRADA MILLER FREIGHT SYSTEM, INC. v. REXCO, INC. AND REA EXPRESS, INC.

No. MC-C-8864

SCHNEIDER TRANSPORT, INC. v. REA EXPRESS, INC.

No. MC-C-8867

AMERICAN TRUCKING ASSOCIATIONS, INC. v. REA EXPRESS, INC.

No. MC-C-8874

ASSOCIATED TRUCK LINES, INC., ET AL. v. REA EXPRESS, INC.

No. MC-66562 (Sub-No. 2345) (Part No. 181)

REA EXPRESS, INC. — PETITION OF AMERICAN TRUCKING ASSOCIATIONS, INC., FOR DISMISSAL OF APPLICATION

No. MC-66562 (Sub-No. 2308 TA)

REA EXPRESS, INC. — PETITION OF AMERICAN TRUCKING ASSOCIATIONS, INC., FOR CANCELLATION OF TEMPORARY AUTHORITY

Investigation of the matters and things involved in these proceedings, having been made and the Commission on the

date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is made a part hereof:

It is ordered, That in proceedings Nos. MC-C-8862, MC-C-8864, MC-C-8867, and MC-C-8874, defendant REA Express, Inc., Bankrupt, C. Orvis Sowerine, Trustee in Bankruptcy, be, and it is hereby notified an drequired to cease and desist forthwith, an thereafter to refrain and abstain from all operations of the character found in this report to be unlawful and in violation of the Interstate Commerce Act, unless and until appropriate authority therefor is obtained, and said defendant is further required to comply with the provisions of Rule 99 of the Commission's General Rules of Practice (49 CFR 1100.99).

It is further ordered, That in proceeding No. MC-66562 (Sub-No. 2345) (Part No. 181), the proceeding be and it is hereby, dismissed.

It is further ordered, That in proceeding No. MC-66562 (Sub-No. 2308 TA), the temporary authority granted by the order of June 3, 1968, as extended, be and it is hereby revoked.

It is further ordered, That all motions filed herein be, and they are hereby, denied.

And it is further ordered, That the statutory effective and compliance date of this order shall be 30 days after the date of service hereof.

By the Commission.

Robert L. Oswald,
Secretary

(SEAL)

APPENDIX C

ORDER OF COMMISSION ON RECONSIDERATION

(Service Date: January 28, 1977)

ORDER

At a general Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 27th day of January, 1977.

No. MC-C-8862

BRADA MILLER FREIGHT SYSTEM, INC. v. REXCO, INC. AND REA EXPRESS, INC.

No. MC-C-8864

SCHNEIDER TRANSPORT, INC. v. REA EXPRESS, INC.

No. MC-C-8867

AMERICAN TRUCKING ASSOCIATIONS, INC. v. REA EXPRESS, INC.

No. MC-C-8874

ASSOCIATED TRUCK LINES, INC., ET AL. v. REA EXPRESS, INC.

No. MC-66562 (Sub-No. 2345) (Part No. 181)

REA EXPRESS, INC., PETITION OF AMERICAN TRUCKING ASSOCIATIONS, INC., FOR DISMISSAL OF APPLICATION

No. MC-66562 (Sub-No. 2308 TA)

REA EXPRESS, INC. — PETITION OF AMERICAN TRUCKING ASSOCIATIONS, INC., FOR CANCELLATION OF TEMPORARY AUTHORITY

Upon consideration of the record in the above-entitled proceedings, and of:

(1) (a) Motion and petition (treated as a single pleading) of Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express

and Station Employees (BRAC) for leave to file a petition to intervene and (b) accompanying petition for reconsideration and/or rehearing or further hearing and petition for modification of effective date of Commission order, respectively filed and tendered on December 7, 1976;

(2) Petition of C. Orvis Sowerwine, Trustee in Bankruptcy for REA Express, Inc., Bankrupt, defendant, filed December 13, 1976, for reconsideration, or alternatively, reopening, further hearing and reconsideration;

(3) Petition of Alltrans Express U.S.A., Inc., intervenor in opposition, filed December 20, 1976, for reconsideration;

(4) Motions (treated as replies) of American Trucking Associations, Inc., complainant-petitioner, filed December 20, 1976, to the pleadings in (1)(a) and (b) above;

(5) (a) Petition of Matthew E. Manning, et al., representing themselves and all other similarly situated for leave to intervene and (b) embraced petitions to vacate order and further hearing, respectively filed and tendered on December 20, 1976;

(6) Joint reply of Brada Miller Freight System, Inc., et al., complainants, filed December 21, 1976, to the pleadings in (1)(a) and (b) above:

(7) Reply of Schneider Transport, Inc., complainant, filed December 27, 1976, to the pleadings in (1)(a) and (b) above;

(8) Replies of Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and

Station Employees, filed January 4, 1977, to the pleadings in (4) above;

(9) Reply of American Trucking Associations, Inc., complainant-petitioner, filed January 10, 1977, to petitions in (2) and (3) above;

(10) Joint reply of Associated Truck Lines, Inc., et al., complainants, filed January 10, 1977, to the petitions in (1)(a) and (b), (2) and (3) above;

(11) Joint reply of Brada Miller Freight System, Inc., et al., complainants, filed January 10, 1977, to petitions in (2) and (3) above;

(12) Joint reply of Brada Miller Freight System, Inc., complainants, filed January 10, 1977, to the petitions in (5)(a) and (b) above;

(13) Reply of Schneider Transport, Inc., complainant filed January 10, 1977, to the petition in (2) above;

(14) Reply of Schneider Transport, Inc., complainant, filed January 10, 1977, to the petition in (3) above;

(15) Reply of Schneider Transport, Inc., complainant, filed January 10, 1977, to the petitions in (5)(a) and (b) above; and

It appearing, That in its petition for intervention, BRAC alleges a right to intervene herein at this time pursuant to Section 17(11) of the Interstate Commerce Act which reads as follows:

> Representatives of employees of a carrier duly designated as such may intervene and be heard in any proceeding arising under this Act affecting such employee;

that by its own admission appearing at page 2 of its motion for leave to file petition to intervene in (1)(a) above BRAC

"was aware of these proceedings shortly before the hearing" and chose not to intervene because it concluded that it could not aid in the development of the record herein in that it was not knowledgeable as to the REA operations being challenged; that, nevertheless its decision not to intervene was also made with the knowledge that the survival of the operating rights of REA's estate was in issue in the complaint proceeding and therefore it was aware that the interests of the workers it represents could be affected therein; that Section 17(11) by its terms, places the decision to intervene herein with BRAC as the duly authorized representative of REA's former employees; that along with the right of intervention conferred upon such a duly authorized representative by Section 17(11), there is an attendant duty to exercise that right responsibly; that with the actual knowledge possessed by BRAC before hearing in this matter, BRAC made an informed election not to intervene and knowingly relinquished any right of intervention herein under Section 17(11); that as the duly authorized representative of former REA employees, BRAC could and did relinquish their rights herein under Section 17(11); that therefore BRAC's petition for intervention is properly considered, along with that of Manning et al., in (5) (a) above, under the intervention rules of the Commission's General Rules of Practice;

It further appearing, That a review of their pleadings reveals that both BRAC and Manning et al., possessed actual and/or constructive knowledge of this proceeding such that, with reasonable diligence, they could have seasonably intervened herein; that in failing to do so they are not entitled to intervention at this time under Rule 72(b) of this Commission's General Rules of Practice; that in any event, a review of their various pleadings reveals further: (1) that they have not alleged sufficient facts to demonstrate their possible success herein to warrant the broadening of the issues of this proceeding that their intervention and request

for further hearing would create; and (2) that even if the arguments in their tendered petitions were considered, they would not warrant a result different from that found by this Commission in its decision herein of November 17, 1976;

It further appearing, That nothing in our foregoing remarks should be construed to affect any rights of intervention which BRAC or Manning et al., might have in the REA-Alltrans finance proceeding in No. MC-F-13003;

It further appearing, That intervenor in opposition Alltrans argues on reconsideration that it was error for this Commission not to treat first its applications in Nos. MC-F-13003 and MC-99388 (Sub-No. 11) (1) for temporary authority under Section 210a(b) of the Act to operate under No. MC-66562 (Sub-No. 2308 TA), the so-called REA Hub temporary authority and (2) for substitution as applicant in No. MC-66562 (Sub-No. 2345 (Part No. 181)), the so-called Hub application for permanent authority, thereby, as is alleged by Alltrans, rendering moot the essential issues in this proceeding; that this Commission is vested with broad discretion under Section 17(3) of the Act to "conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice "[see *Akron, C. & Y. Ry. Co. v. United States*, 22 F.2d 196 (1927) and compare *FCC v. Shrieber*, 381 U.S. 279 (1965)]; that Alltrans' proposal in this regard was properly rejected in that to have followed its suggestion would have allowed the defendant to "transfer away" redress for its breaches of the Act and this Comission's rules and regulations alleged hercin; that moreover, it should be pointed out that Alltrans can receive no greater interest in the involved Hub application and temporary authority than that of REA, together with any infirmities, both inherent or acquired, in connection with said application and authority; that in a very real sense the instant proceeding involved a determination of those interests and

infirmities; and that in these circumstances, the disposition herein properly preceded disposition of the applications of Alltrans noted above;

It further appearing, That defendant challenges the Commission's findings of willfulness in the perpetration of the unlawful operations of its Rexco division attributed to defendant in the November 17, 1976, decision herein; that it argues that these operations were conducted under a color of right, and thus were not willful, in that said Rexco operations were performed (1) pursuant to approval of the REA Bankruptcy Court (United States District Court for the Southern District of New York) and (2) with the knowledge and, assertedly the acquiescence of the Commission through statements of its personnel and a statement filed with the Bankruptcy Court; that first, court approval of the continuation of the Rexco operations did not insulate defendant from the involved action [compare *N.L.R.B. v. Baldwin L. Works*, 128 F.2d 39 (1942)]; that second, even if it is assumed that Commission personnel made arguably favorable statements concerning the Rexco operations, it is well-settled that the Commission cannot be bound by such statements and defendant cannot reasonably rely upon them such as to negate any willful aspect of its operations involved herein [see *U.S.A.C. Transport, Inc. v. United States*, 235 F. Supp. 689 (1964), aff'd. per curium, 380 U.S. 450 (1965)]; that the Commission's statement to the Bankruptcy Court referred to above indicated that the Rexco operations were under investigation, and for the Commission to have further qualified its statement would have been improper under the circumstances; that nevertheless, that statement certainly was not a condonation of Rexco's unlawful operation; that on the contrary said statement should have put a reasoanble person acting in good faith on notice of the possible unlawfulness involved in those operations; and that finally, there is substantial and convincing evidence of record to

support the finding that the involved operations were totally unlawful, demonstrating, at the very least, a lack of supervision or such disregard of statutory regulation irrespective of evil intent or erroneous advice, constituting willful behavior on the part of defendant [see *Goodman v. Benson*, 286 F.2d 896 (1961) and compare *United States v. Illinois Central Railroad Co.*, 303 U.S. 239 (1938)];

It further appearing, That defendant challenges the dismissal of the Hub permanent application based on (1) a prejudgment of the merits of said application with regard to (a) a public need for the service proposed and (b) defendant's fitness and (2) statements of repudiation of the operational feasibility and economy of the service proposal by REA in other proceedings before this Commission; that defendant argues that should it be decided that the above-mentioned issues of public need and fitness are at issue herein, defendant requests further hearing to adduce evidence as to those issues; that the above-referred to statements of repudiation are relevant herein on the issue of defendant's breach of Rule 247(f) of the Commission's Special Rules of Practice [49 CFR 1100.247(f)] which states, in pertinent part, that "[a]n applicant who does not intend timely to prosecute its application shall promptly request dismissal thereof"; that said statements of repudiation are probative of REA's intent in this regard; that even though the Hub application was on file with the Commission for 8 years, the Commission did not thereby abdicate its duty to enforce Rule 247(f); and that the failure to dismiss the Hub application at an earlier date was based on this Commission's desire to allow REA every reasonable opportunity to develop a practical all-motor operation in light of REA's historically unique rail-related service; and that REA's attempt and failure to do so and its eventual bankruptcy cannot justify its breach of Rule 247(f) and thereby reverse the consequent dismissal of the Hub application;

It further appearing. That defendant contends that the Commission erred in revoking the Hub temporary authority in that prior to revocation, defendant, assertedly, was entitled to

(1) Notice by the agency [Commission] in writing of the facts or conduct which warrant the action; and

(2) Opportunity to demonstrate or achieve compliance with all lawful requirements,

under title 5 USC Section 558; that this contention is not meritorious, in that the notice and compliance provisions of Section 558 above-noted do not apply to revocation of temporary authority [compare *Great Lakes Airlines, Inc., v. Civil Aeronautics Board,* 294 F.2nd 217 (1961), cert. denied, 366 U.S. 965 (1961)]; that moreover, by the terms of Section 558, said notice and compliance portions do not apply "in cases of willfulness" and such a case is involved herein;

And it further appearing. That by order of the United States Court of Appeals for the Second Circuit of January 5, 1977, the Commission's decision herein of November 17, 1976, has been stayed pending judicial review thereof; and good cause appearing therefor:

It is ordered. That the petitions in (1)(a) and (5)(a) above be, and they are hereby, denied for the reasons set forth in the first and second "appearing" paragraphs above.

It is further ordered. That the petitions in (1)(b), (5)(b), and (8) above, be, and they are hereby, rejected.

It is further ordered. That the petitions in (2) and (3) above be, and they are hereby denied for the reasons that the findings of the Commission in its report and order entered November 17, 1976, are in accordance with the evidence and the applicable law; and that no sufficient or

proper cause appears for reopening the proceeding for reconsideration, for further hearing or for granting any of the relief sought.

By the Commission, Commissioner O'Neal concurring in the result. Commissioner Hardin did not participate.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX D

STATUTES AND REGULATIONS INVOLVED

APPENDIX "D"

STATUTORY PROVISIONS INVOLVED

Interstate Commerce Act —

A. Section 206(a)(1) provides:

(a) (1) Except as otherwise provided in this section and in section 210a of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operations on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210 of this title, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instances as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate was made to the Commission as provided in subsection (b) of this section and within one hundred and twenty days after October 1, 1935, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operations to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for

in section 207(a) of this title and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful.

B. Section 210a(a) provides:

(a) To enable the provision of service for which there is an immediate and urgent need to a point or points within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

RULES INVOLVED

Rule 247(f) of the Commission's Rules of Practice provides:

Failure to prosecute applications. — An applicant who does not intend timely to prosecute its application shall promptly request dismissal thereof. Failure to prosecute an application under procedures ordered by the Commission will result in dismissal thereof. Submission of a request for dismissal of an application later than 15 calendar days after the service date of a notice setting it for oral hearing, or failure by applicant to appear and prosecute the application at such hearing will result in dismissal thereof and will bar the filing of any application for the same or any part of the same authority by the same applicant for a

period of 1 year after the date of the dismissal order except upon a petition showing good cause why this rule should be waived. Such petition shall be served upon all protestants to the prior application.